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# Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government

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# FRAGMENTING THE UNITARY EXECUTIVE: CONGRESSIONAL DELEGATIONS OF ADMINISTRATIVE AUTHORITY OUTSIDE THE FEDERAL GOVERNMENT

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In the past decade, Congress has increasingly experimented with innovative means to control its expansive delegations of authority to the executive branch. Congress has reserved for itself a veto of executive branch policy,[1] granted its own committees the power to approve proposed executive action,[2] vested policymaking authority in the Comptroller General[3] (an officer the Supreme Court has held is an agent of Congress),[4] and established independent commissions to set policy on sensitive issues that Congress has itself been unwilling to decide.[5] By

* Assistant Professor of Law, University of Virginia. I would like to thank Lillian BeVier, Michael Klarman, Saul Levmore, Glen Robinson, George Rutherglen, William Stuntz, Peter Swire, and Nicholas Zeppos for offering comments on earlier drafts. I would also like to thank Jeffrey Beyle, Brian Freeman, and Marion Lewis for their research assistance.

1 Such efforts were invalidated in *INS v. Chadha*, 462 U.S. 919 (1983). At that time, Congress had included legislative veto provisions in over 200 enactments.

2 *See,e.g.*, American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) (empowering committee of Congress to decide whether to permit the Department of Housing and Urban Development to proceed with a planned reorganization scheme).

3 Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating delegation of authority to the Comptroller General to specify budget reductions under the Gramm-Rudman-Hollings Act); Ameron, Inc. v. United States Army Corps of Eng'rs, 809 F.2d 979 (3d Cir. 1986) (sustaining Comptroller General's authority to modulate congressionally mandated stay of procurement under Competition in Contracting Act), *cert. dismissed*, 109 S. Ct. 297 (1988).

4 *Bowsher*, 478 U.S. at 727-32.

5 For example, in 1967 Congress established the Commission on Executive, Legislative, and Judicial Salaries to recommend annually appropriate salary increases for various high-level federal officials, including members of Congress, the Vice-President, cabinet members, and federal judges. 2 U.S.C.A. §§ 352, 356 (West Supp. 1989). In 1985 Congress provided that the recommendations of the Commission would automatically go into effect 30 days after the President submitted them to Congress, unless both houses should disapprove by a joint resolution within that time. Pub. L. No. 99-190, § 135(e), 99 Stat. 1322 (1985) (codified in 2 U.S.C.A. § 359(1) (West Supp. 1989)). The Commission's recommendation of a 50% pay increase for 1989, however, demonstrated that this technique is not always enough to allow Congress to evade accountability. Public pressure eventually forced Congress to repudiate the increase. Kenworthy, *House, Senate Reject 51% Salary Increase*, Wash. Post, Feb. 8, 1989, at A1, col. 5.

For other recent congressional efforts to foist sensitive decisionmaking on an independent com-

reserving power for itself, its committees, and its agents, Congress has tried to exert continuing influence over delegations of authority to the Executive. Similarly, by vesting responsibilities in officials independent of the President's authority, Congress has attempted to restrict the Executive's involvement in executing such laws, even if it relinquishes control itself.[6]

Congress has also pursued the more dramatic tack of delegating administrative authority outside the federal government altogether, at times directing state officials, private individuals, and private groups to implement and execute legislative plans. Individuals and entities outside the federal government, who may not be politically accountable for their actions[7] and who owe no direct allegiance to the executive branch, have thus exercised considerable authority at the behest of Congress.[8] The

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mission, see Defense Authorization Amendments and Base Closure Realignment Act, Pub. L. No. 100-526, 102 Stat. 2623, 2627-31 (establishing independent commission to select military bases for closure); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (codified in scattered sections of 18 U.S.C.) (vesting authority in United States Sentencing Commission to promulgate binding sentencing guidelines).

[6] Judicial reaction to these innovations has been mixed. Generally, courts have invalidated congressional arrangements under which Congress has reserved for itself some power to execute the laws directly. *Bowsher*, 478 U.S. at 14; *Chadha*, 462 U.S. at 919; Buckley v. Valeo, 424 U.S. 1 (1976). In contrast, courts have upheld congressional delegations of authority to independent government officers, even if the delegation embodied purely "executive" power, Morrison v. Olson, 108 S. Ct. 2597 (1988) (upholding grant of power to independent counsel under the Ethics in Government Act), and even if the delegation vested power in a federal government official outside the executive branch altogether, Mistretta v. United States, 109 S. Ct. 647 (1989) (upholding congressional establishment of a United States Sentencing Commission in the judicial branch). Perhaps because of the perceived comparative strength of the executive branch, courts have seemingly been unconcerned about the potential evisceration of executive authority, unless Congress has benefited directly from the arrangement.

[7] By accountability, I generally mean political responsibility to the electorate. Accountability takes on a slightly different hue depending upon the political actor. Congress' accountability requires that Congress pass laws or make binding policy in such a way that an electorate can hold Congress responsible for that policy. *See infra* notes 40-53 and accompanying text. Executive branch accountability means that policy made by the executive branch can be traced to the President whose political fortunes hinge, at least in part, on the perceived merit of the policy. Article II of the Constitution helps ensure such accountability by granting the President the duty to appoint and remove subordinates. *See infra* notes 24-39 and accompanying text. If private actors are to be politically accountable at all, they must be directly responsible either to Congress or the executive branch for their actions.

[8] Congress may choose to delegate authority outside the federal government to elicit participation on government projects from experts in the private sector, to monitor conduct in the private sector without regulating the entire field, to generate political support for a particular regulatory scheme, or to curtail executive branch control over delegated authority.

Indeed, by delegating authority to private parties, Congress may facilitate the private market—government may be needed to eliminate information or transaction costs that impede operation of the market. Some delegations outside the federal government have recently generated substantial interest in the academic community under the rubric of "privatization." *See, e.g., Symposium, Privatization: The Assumptions and Implications*, 71 MARQ. L. REV. 445 (1988). Many efforts at privatization do not involve congressional delegations of authority, but rather congressional decisions that the government should withdraw from a particular pursuit altogether or government sale of assets.

prospect of continued delegations recently prompted Justice Scalia to lament:

> I foresee all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create an expert Medical Commission (mostly MDs, with perhaps a few PhDs in moral philosophy) to dispose of such thorny, "no win" political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research. This is an undemocratic precedent that was set—not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government.[9]

Congressional delegations outside the federal government raise to the fore a long-simmering, yet little analyzed, question of constitutional law: whether the separation of powers doctrine blocks congressional delegations outside the federal government even if that same grant of power can permissibly be vested in the executive branch.

In this Article, I will examine the constitutional enigma posed by congressional delegations outside the federal government. I say enigma, because such delegations—irrespective of the academic commentary[10]—

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In this Article, however, I will focus on congressional delegations of authority outside the federal government, which comprise only one aspect of the privatization debate. *See* Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 456-61 (1988). Because Congress rarely leaves decisionmaking to the private market, the efficiency gains hoped for by proponents of privatization may vanish. *Cf.* Veljanovski, *Privatization in Britain-The Institutional Constitutional Issues*, 71 MARQ. L. REV. 558, 571-72 (1988) (efficiency gains depend upon institutional changes brought about by privatization).

A related aspect of privatization involves executive branch decisions to contract out functions to the private sector, which is routinely done pursuant to Office of Management and Budget Circular A-76, 48 Fed. Reg. 37 (1983). In contrast to some congressional decisions to "contract out" or delegate, the executive branch largely retains control over both the decision whether to involve private parties and the private performance of government tasks. As will become clear during the discussion of the separation of powers doctrine, contracting out at the executive branch level simply does not give rise to the same panoply of constitutional concerns as do direct congressional delegations themselves, primarily because executive officials remain publicly accountable for the authority which is contracted out.

9 Mistretta v. United States, 109 S. Ct. 647, 680 (1989) (Scalia, J., dissenting).

10 *See* Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 166 (1989); Becker, *With Whose Hands: Privatization, Public Employment, and Democracy*, 6 YALE L. & POL'Y REV. 88 (1988); Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Air Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337 (1988); Boyer & Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFFALO L. REV. 833, 868-95 (1985); Cass, *supra* note 8; Jaffee, *Law Making By Private Groups*, 51 HARV. L. REV. 201, 234-53 (1937); Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 649 (1986); Liebman, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975); Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 922-29 (1988) (addressing applicability of nondelegation doctrine to delegations outside the government); Note, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649 (1987); *cf.* A. LEISERSON, ADMINISTRATIVE REGULATION 240-61 (1942) (addressing constitutional objections to such delegations); Bruff, *Public*

are simply inconsistent with the separation of powers doctrine as currently articulated by the Supreme Court.[11] Since the New Deal, we have accepted massive delegations to executive branch agencies. But it is not clear whether, assuming some fidelity to the Supreme Court's pronouncements on separation of powers, we should be prepared to accept comparable delegations outside the federal government entirely. Congress, for instance, has vested in the Secretary of Labor the power to determine binding standards governing workplace safety at coal mines.[12] But assume instead that Congress directs the Secretary to enforce standards set by a national organization of coal producers or by the United Mine Workers of America (UMW). Alternatively, suppose that Congress establishes a national commission, comprised of members of the national producer organization, the UMW, and Presidential appointees to work together to formulate the binding standards. Or, what if Congress eliminates the Secretary of Labor's enforcement function and places it instead in the hands of the states or private individuals? One cannot plausibly contend that the Executive's power to coordinate and supervise implementation of the laws is undiminished under these hypothetical congressional schemes,[13] or that individuals affected by safety in coal mines lack an interest in the identity and institutional affiliation of the entity formu-

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*Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 455-63 (addressing constitutional parameters of congressional delegations to private arbitrators).

11 In this Article, I will analyze delegations outside the federal government primarily from the perspective of the separation of powers doctrine as it is currently applied by the Supreme Court. Although the Supreme Court may not have expressed its views with great clarity, it has stressed that the system of separated powers was designed, in the long run, to protect individual liberty by assuring that government policy emerge through a system of checks and balances. No one would suggest that all laws generated by the constitutional process are truly public regarding, and similarly no one would suggest that all policy made by unaccountable private individuals is self-serving. Yet the separation of powers doctrine presupposes that we are safer adhering to the specifics of the constitutional structure even when that structure seems cumbersome, and even when more flexible approaches appear capable of safeguarding the content of public policy. I have sketched what I believe to be the principles underlying the Court's approach in Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988). Those disagreeing with the Court's approach (or my interpretation of that approach) may nonetheless readily agree with this Article's thesis that delegations of power outside the federal government cannot readily be reconciled with the Court's contemporary separation of powers jurisprudence.

12 30 U.S.C. § 811 (1989).

13 To be sure, some congressional delegations outside the federal government may, as a practical matter, augment the power of the executive branch. If Congress would never agree to regulate a particular field but for its ability to vest some implementation responsibility outside the federal government, then Congress' delegation may leave the executive branch with greater authority than it would otherwise enjoy, assuming that Congress vests some enforcement responsibilities in the executive branch as well. For instance, if Congress did not have the flexibility to empower various entities outside the federal government to shape the content of the safety rules, it might not regulate workplace safety at all, and then the executive branch would have no role in enforcing safety standards. Despite the executive branch's possible acquiescence to the delegation, however, individuals subject to the delegated authority may object to the form that the new regulation takes.

lating the binding standards. Yet Congress has made delegations comparable to all those suggested above, and its recent efforts to delegate authority outside the President's immediate control suggest that further delegations outside the federal government may be on the horizon.[14]

My focus in this Article will be on congressional delegations outside the federal government of what is commonly thought to be administrative or executive-type authority,[15] much as in the safety standards hy-

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[14] Congress has also delegated judicial or adjudicative powers to persons outside the federal government. The federal rules have long recognized the powers of private masters, see Fed. R. Civ. P. 53, to adjudicate factual disputes, and private arbitrators have played critical roles in various statutory schemes. *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(a) (requiring arbitration of compensation issues arising under registration provisions in Act); National Railway Act, 45 U.S.C. § 153 First (a)-(h) (creating mandatory arbitration under provisions of federal labor laws); Federal Labor Relations Act, 5 U.S.C. §§ 7121-22 (same). Congress has, in addition, directed that private parties serve as hearing officers under the Medicare Act. *See* Schweicker v. McClure, 456 U.S. 188 (1982).

Congressional delegation of what is commonly thought of as judicial power does not present the same threat to the separation of powers doctrine as does delegation of executive-type authority, because the Executive has not historically controlled dispute resolution functions, and because individual interests are protected to some extent under the due process clause and under article III. Moreover, the threat to the judiciary is not pronounced, for Congress unquestionably can authorize state courts to adjudicate federal claims, and it has historically framed such disputes for resolution by non-article III federal judicial officers beyond the President's direct removal authority. Even though there is some confluence between such delegations and those of more purely "administrative" authority, I have focused only on delegation of administrative or executive-type power in this Article. For a discussion of delegated adjudicative power, see Bruff, *supra* note 10.

[15] Although a precise definition of when congressional delegations include administrative or "executive-type" authority is impossible, the delegated power to make rules, implement statutory policy and enforce statutory commands constitute the day-to-day grist of administrative agencies and unquestionably implicate the Executive's authority. By administrative authority, therefore, I do not mean inherent executive authority—such as the foreign affairs or pardon power—but rather the power derived from statute to execute and implement the laws. *Cf.* Bowsher, 478 U.S. at 733 (including within execution of the laws the administrative duties discharged by the Comptroller General to determine "precisely what budgetary calculations are required," even though Congress could have discharged such functions itself). In other words, Congress may exercise most delegated power itself by passing more detailed statutes but, to flesh out and implement its policies, it has chosen instead to rely on others. Congress has selected for delegates not only independent administrative agencies within the executive branch but also states and private individuals outside the federal government.

To be sure, at some level, almost every action can be considered administrative or "executive," because the federal government has either affirmatively authorized the action taken by a private individual, or has agreed to protect an individual's course of conduct. As a classic example, self-help remedies can also be viewed as delegation of government authority over dispute resolution. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157 (1978); *id.* at 171-72 (Stevens, J., dissenting). *See generally* M. COHEN, PROPERTY AND SOVEREIGNTY IN LAW AND SOCIAL ORDER 41 (1933) (since property rights and contract rights are enforced by state, they represent delegated public power); M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 102-09 (1987); Brest, *State Action and Liberal Theory: A Case Note on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1300-02 (1982); Tushnet, Shelley v. Kraemer *and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383, 384-91 (1988). Even though much conduct by private actors can ultimately be traced to a congressional delegation, only in relatively rare situations has Congress placed the coercive power of the federal government directly behind acts of entities outside the federal government. Any inquiry into administrative or

potheticals. The concept of "delegation," however, is not self-defining. Congressional acts which direct entities in the executive branch to carry out legislative objectives are generally considered delegations; it is not as clear whether congressional acts which permit interested private groups to determine whether regulations go into effect should also be considered delegations. Similarly, statutes authorizing executive branch agents to enforce the laws are considered delegations, but statutes creating private rights of action may not be. Although I do not attempt to define the parameters of "delegation," I include in my discussion any congressional act which empowers those outside Congress to enforce or implement a legislative objective and backs those efforts with the coercive force of the federal government.

In Section I, I canvass the potential constitutional arguments against delegations of administrative authority outside the federal government. Although the problem posed by delegations of governmental power to private individuals is longstanding, it has been analyzed almost exclusively as a subset of the overall delegation problem. In contrast, I argue that such congressional delegations—at least from a theoretical vantage point—pose two distinct problems under the separation of powers doctrine as it is understood today. First, delegates outside the federal government may not be politically accountable to the Executive because they are subject to neither the President's appointment nor removal power. Congressional delegations outside the federal government may therefore prevent the Executive from superintending the execution of legislative enactments. Second, if the delegates outside the federal government are accountable instead to Congress, Congress may be able to keep the reigns of power without facing direct electoral accountability for the subsequent formulation of policy.

I examine a sampling of Congress' many delegations of administrative power outside the federal government in Section II. The delegations have taken various forms. The most familiar consist of congressional delegations of authority to states and state officials to implement and help enforce federal regulatory schemes. Such delegations can perhaps be justified by the principle of federalism—the constitutional interest in state sovereignty may trump the competing constitutional norm of a centralized federal executive. But delegations to private individuals and entities cannot be so easily explained. Congress has, for instance, directed private individuals to exercise administrative authority by serving in and working with government agencies, authorized private groups targeted for federal regulation to participate in determining both the content and applicability of binding federal regulations, and authorized individuals, even in the absence of personal injury, to sue to enforce federal laws.

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government power in its broadest manifestation is simply too openended, so I have concentrated rather on the type of powers customarily delegated to administrative agencies.

Admittedly, many of the delegations do not present an immediate threat to either individual liberty or the balance of powers. However such delegations are troubling analytically and provide precedent for further congressional experimentation.

Finally, Section III addresses several ways to reconcile the seeming divergence between the separation of powers doctrine and congressional delegations of authority outside the federal government. Because the delegations vest administrative power in individuals whom the Executive cannot designate or remove, a formalist justification for delegations outside the federal government is not possible.[16] Two other explanations, however, are plausible.

First, a functionalist approach might emphasize that much of the authority delegated outside the federal government, even if exercised by delegates neither appointed nor subject to removal by the President, is nevertheless constrained by an array of checks and balances. The absence of presidential appointment and removal authority may not preclude the President from exercising supervisory authority over the congressional delegates. Private or state delegates may be cabined by preexisting executive branch policy or by effective executive branch oversight. Congressional delegations which cannot be explained on this basis may nevertheless be checked by some external constraint—whether private constituencies, market forces, judicial review or, in the case of delegations to states, state political constituencies. The presence of external checks minimizes the concern over what can be viewed as a politically unaccountable exercise of administrative authority. Although the external check explanation has considerable descriptive power, gaps remain and, in any event, such an explanation can only be reconciled with the constitutional structure by abandoning (or at least truncating) article II's requirement that the executive branch must superintend execution of all federal laws.

Second, a quite different explanation might stress that the imperative of a centralized executive is just one constitutional value to be accommodated with others—most notably with the value of political participation that arguably underlies our constitutional fabric. Indeed, congressional delegations of authority outside the federal government have facilitated individual participation in government in ways other than through congressional and presidential elections. Just as delegations to state officials embody congressional respect for sovereignties of political units outside the federal system, delegations to private groups may be understood as attempts to allow citizens to help govern themselves, even if the exercise of authority supplants the President's seeming

[16] Formalists generally favor adhering to the specifics of the text in resolving separation of powers disputes, while functionalists are more likely to assess the underlying purpose of the text in analyzing the separation of powers question in dispute. *See generally* Krent, *supra* note 11, at 1254-55.

constitutional authority to superintend all laws passed by Congress. The private attorney general cases might be viewed in this same vein—individuals can enforce federal law through initiation of lawsuits because the lawsuits represent traditional ways in which individuals participate in defining the community in which they live. Yet the participatory explanation is quite troubling, for if the constitutional principle of a centralized executive is not paramount, then Congress can remove executive functions from the President's supervision for any number of reasons as long as the judiciary ultimately agrees that the congressional value at stake is more important than executive control.

Despite the possible explanations, therefore, some congressional delegations outside the federal government cannot be reconciled with our current understanding of the separation of powers doctrine. Continued delegations should prompt us to re-evaluate either the wisdom of such delegations or the principles underlying our notion of separation of powers.

## I. CONSTITUTIONAL RESTRICTIONS ON CONGRESSIONAL DELEGATIONS OF AUTHORITY OUTSIDE THE FEDERAL GOVERNMENT

Extensive congressional delegations of authority outside the federal government have occurred largely without any consideration of their constitutional justification.[17] Scant attention has been paid to the constitutional differences between congressional delegation to officers in the executive branch and to those outside government altogether.[18] In this

[17] For those few cases which have considered and rejected challenges based on undue delegations to private parties, see Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940) (upholding delegation to coal commission on ground that the private entity "function[s] subordinately" to the public oversight agency); United States v. Rock Royal Co-op, Inc., 307 U.S. 533, 577-78 (1939) (upholding legislation requiring Secretary of Agriculture to submit proposed milk marketing orders to producers for approval); Currin v. Wallace, 306 U.S. 1, 15-16 (1939) (upholding similar approval requirement under Tobacco Inspection Act of 1935); St. Louis & Iron Mountain Ry. v. Taylor, 210 U.S. 281, 285-87 (1908) (sustaining the delegation without mentioning private participation); United States v. Frame, 885 F.2d 1119 (3d Cir. 1989) (sustaining delegation to private beef producers under Beef Promotion and Research Act of 1985), *cert. denied*, 110 S. Ct. 1168 (1990); Cospito v. Heckler, 742 F.2d 72 (3d Cir. 1984) (upholding delegation to private Joint Commission on Accreditation of Hospitals to accredit hospitals and thereby entitle them to participate in Medicare program); Association of Am. Physicians and Surgeons v. Weinberger, 395 F. Supp. 125 (N.D. Ill. 1975), *aff'd*, 423 U.S. 975 (1975) (upholding delegation to Professional Standards Review Organization); Corum v. Beth Israel Medical Center, 373 F. Supp. 550, 551-53 (S.D.N.Y. 1974) (upholding requirement in Hill-Burton Act that vests a private body with the power to veto regulations proposed by the Secretary of then Health Education and Welfare); *cf.* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating delegation to private party under Bituminous Coal Conservation Act); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (criticizing delegation to private party under National Recovery Act).

[18] Professor Davis, for instance, discusses delegation to private parties only briefly, concluding that no consistent principles appear in the case law. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 193-95 (2d ed. 1978). Other treatise writers do not mention private delegations in discussing the

Section, I examine the potential separation of powers objections to congressional delegations of authority outside the federal government. I agree with recent commentary that delegations of power to private persons would likely survive constitutional attack under the nondelegation doctrine, at least as it is currently constituted.[19] Some might argue further that delegating authority outside the federal government altogether—as opposed to an independent agency—removes any separation of powers concern, presumably because our system of separated powers addresses only the allocation of powers exercised by governmental authorities. But authority exercised by delegates outside the federal government may affect the balance of powers within the government, depending on who controls the delegate. Indeed, more serious separation of powers concerns arise with congressional delegations of authority outside the federal government than with delegations to independent agencies—because of the possible lack of executive branch supervision, the concomitant potential for increased congressional power, and the resultant fear of arbitrary, unreflective governance.[20]

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nondelegation doctrine. *See, e.g.*, R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 3.4 (1985); B. SCHWARTZ, ADMINISTRATIVE LAW §§ 2.1—2.27 (2d ed. 1984); *see also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 4.8, at 150 (3d ed. 1986) (addressing topic in two sentences); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-17, at 368-69 (2d ed. 1988) (briefly addressing subject).

[19] Bruff, *supra* note 10, at 455-58; Cass, *supra* note 8, at 497-502; Robbins, *supra* note 10, at 919-21.

[20] Commentators have agreed that broad congressional delegations of authority to private persons raise concerns under the due process clause in the fifth amendment. If private persons can wield power in the name of the state, other individuals may suffer deprivations of property or liberty without due process of law. *See, e.g.*, Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 659 (1986). *But cf.* D. MUELLER, PUBLIC CHOICE 1 (1979) (Public choice theorists would counter that public servants wield authority for private interests as a matter of course). Indeed, in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Supreme Court invalidated part of a statutory scheme in which a majority of miners and producers of two-thirds of the annual tonnage established the minimum wage which would be binding on the entire group. The Court stated that:

> This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . . . And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.

*Id.* at 311. In other words, larger producers might seek to weaken smaller competitors by imposing conditions on all market participants, such as high wages. *See* Jaffee, *supra* note 10, at 252 (noting that it is undeniable that any imaginable group given extensive powers may oppress the minority of the group to exploit it); Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1373-75 (1978) (citing some "horror stories" of large companies controlling national standards that have blocked approval of smaller competitors' products).

No subsequent decision of the Supreme Court has interpreted the due process concerns so expansively, perhaps because of the waning influence of the substantive due process doctrine in economic cases. Indeed, conflicts of interest similar to those faced in *Carter Coal* occur as a matter of course under the Agricultural Adjustment Act under which farmers determine the amount of land allotted to their competitors, *see infra* note 80, and in *Schweiker v. McClure*, 456 U.S. 188 (1982), the

### *A. Nondelegation Doctrine*

According to the Supreme Court's current articulation of the nondelegation doctrine, Congress satisfies its constitutional responsibilities when sufficient guidelines confine its delegate's discretion in implementing the congressional mandate.[21] Congress' duty to delegate with such specificity arises from article I's vesting clause, which states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[22] But this article I requirement, at least at the federal level,[23] can be met if Congress provides guidance for its delegate, irrespective of whether the delegate is a private individual, a state official, or a member of the executive branch. The nondelegation doctrine is indifferent to the identity of Congress' delegate. Thus, the nondelegation doctrine itself may shed little light on the propriety of congressional delegations of authority outside the federal government.

### *B. Threat to Separation of Powers Doctrine as Currently Constituted*

As a theoretical matter, however, some delegations of congressional power outside the federal government are inconsistent with the separa-

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Supreme Court upheld against a due process challenge the power of hearing officers appointed by private insurance carriers to adjudicate Medicare claims, despite the arguable conflict of interest faced by the carriers as federal contractors. Even if state action is present, due process principles should be no more demanding if the delegate is outside the government. Thus, while due process might today serve as a barrier precluding some delegations to private parties (*cf.* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821-25 (1986) (due process requires recusal of Alabama Supreme Court justice engaged in litigation related to matter before him); Tumey v. Ohio, 273 U.S. 510, 531-32 (1927) (due process prohibits judge from being paid for his service only with a share of any fines levied and collected)), the occasion for its use would be rare.

21 *See* Skinner v. Mid-America Pipeline Co., 109 S. Ct. 1726, 1731 (1989) ("[S]o long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed,' no delegation of legislative authority trenching on the principle of separation of powers has occurred.") (citations omitted); American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) (It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations."); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix [certain tariffs] is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

22 U.S. CONST. art. I, § 1.

23 Some state courts have invalidated a wide variety of state laws delegating authority to private individuals in light of similar vesting clauses in state constitutions. *See, e.g.*, Thygesen v. Callahan, 74 Ill. 2d 404, 385 N.E.2d 699 (1979) (invalidating delegation of legislative authority to regulate currency exchanges); Jennings v. Exeter-West Greenwich Regional School Dist. Comm., 352 A.2d 634 (R.I. 1976) (statute requiring public school district to bus children living within its boundaries to private schools held unconstitutional); Affiliated Distillers Brands Corp. v. Gillis, 81 S.D. 44, 130 N.W.2d 597 (1964) (statute allowing commission to fix the size of liquor bottles held unconstitutional for lack of legislative standards); Delta Truck Brokers, Inc. v. King, 142 So. 2d 273 (Fla. 1962) (statute authorizing Florida public utilities commission to impose restrictions on transfers of auto transportation brokerage license held unconstitutional).

tion of powers doctrine currently espoused by the Supreme Court. The exercise of public power by entities outside the federal government may undermine both the political accountability and the checks and balances that our system of separated powers was arguably designed to preserve.

*1. The Article II Interest in Executive Branch Control.*—Congressional delegations outside the federal government may undermine the article II precept of a unitary executive.[24] The choice of one leader to preside over the executive branch was no accident. Debates among the framers and in the ratifying conventions reflect a conscious decision to vest all executive responsibilities—however defined—in one President. Focusing such responsibility upon a single leader ensures "energy" in execution of the law and provides an effective counterweight to feared legislative dominance.[25] The President's responsibility to superintend implementation and enforcement of authority delegated from Congress stems principally from the article II power to appoint officers of the United States and the derivative power to remove all officers exercising executive-type duties. Presidential supervision ensures that, at least in some measure, the chief executive will stand accountable for all exercise of delegated administrative authority. By delegating administrative authority outside the federal government, however, Congress may prevent the Executive from fulfilling that constitutional function.

Pursuant to the appointment power, Presidents can influence implementation of federal policy through their choice of officials.[26] But by

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[24] For a general discussion of the unitary executive, see Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 599-602 (1984).

[25] Professor Pierce, for instance, has recently noted that "[i]n our democratic form of government, important policy decisions cannot be delegated to politically unresponsive individuals. It follows that officials with policymaking responsibility must be subject to Presidential control when they act in that capacity." Pierce, Morrison v. Olson, *Separation of Powers and the Structure of Government*, 1988 SUP. CT. REV. 1, 31. For a functional defense of the unitary executive, see Pierce, *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1251-54 (1990).

Some, of course, have argued that delegations to independent executive agencies violate article II. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 31, 60; Liberman, Morrison v. Olson: *A Formalistic Perspective on Why the Court was Wrong*, 38 AM. U. L. REV. 313, 317 (1989). If the President must exercise plenary removal authority over all individuals exercising "executive-type" power, then a fortiori, delegations of authority outside the federal government raise substantial constitutional concerns.

[26] *See generally* Buckley v. Valeo, 424 U.S. 1, 118-41 (1976); Myers v. United States, 272 U.S. 52, 117, 163-64 (1926). Surely, all would accept the proposition that Presidential appointment of article III judges—even in the absence of any power to remove or discipline judges once appointed—affords the President an important role in shaping judicial policy. Indeed, the Reagan Administration reportedly made appointment of judges one of the key priorities of the Administration. *See Judges with Their Minds Right*, TIME, Nov. 4, 1985, at 77-78; *How Reagan Chooses Judges-And Who He's Likely to Pick*, 99 U.S. NEWS & WORLD REPORT 61 (Oct. 14, 1985).

The reach of the appointments clause, however, is unclear. The Constitution provides that the President shall, with the advice and consent of the Senate, appoint all "officers of the United States."

vesting governmental responsibility in state officials or private individuals, Congress can bypass the President's appointment authority and undermine the Executive's control over law administration generally. If Congress created a private Commission to establish binding safety standards, or just adopted whatever standards were formulated by the UMW, the President's appointment power would obviously be circumvented.[27]

To preserve a unitary executive, the Supreme Court has also recognized the President's inherent right to remove any officer exercising purely executive power.[28] Indeed, the removal authority represents the only formal means by which Presidents can control their subordinates' ongoing exercise of power and ensure unified execution of law.[29] As Hamilton wrote in the Federalist Papers:

> The administration of government is [largely] limited to executive details, and falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature . . . constitute what seems to be most properly understood by the administration of government. The persons, therefore, to whose immediate management these different matters are

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U.S. CONST. art. II, § 2, cl. 2. The status of an individual exercising "governmental" authority would presumably be determined by such factors as remuneration, duration of duties, and the significance of duties. Metcalf & Eddy v. Mitchell, 269 U.S. 520 (1926); Auffmordt v. Hedden, 137 U.S. 310, 327 (1890); United States v. Germaine, 99 U.S. (9 Otto) 508, 511-12 (1879); United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868).

27 *Cf.* Atlanta Journal v. Hill, 257 Ga. 398, 359 S.E.2d 913 (1987) (private commission appointed by city council cannot exercise any official governmental authority); People v. Pollution Control Bd., 83 Ill. App. 3d 802, 404 N.E.2d 352 (1980) (sustaining state attorney general's challenge to legislation delegating authority to private organizations to determine when noise pollution requirements applied to automotive sporting events); Commonwealth v. McKechnie, 467 Pa. 430, 358 A.2d 419 (1976) (statute appointing President of state dental society to state dental examining board constituted unconstitutional delegation). The possibility that Congress, through such delegations, can participate in execution of the laws is discussed at *infra* notes 40-53 and accompanying text.

28 Myers v. United States, 272 U.S. 52, 132-34 (1926) (recognizing Presidential right to remove a postmaster at will); *cf.* Wiener v. United States, 357 U.S. 349 (1958) (countermanding President's discharge of War Claims Commissioner because of mixed duties performed by Commission); Humphrey's Executor v. United States, 295 U.S. 602 (1935) (limiting President's plenary removal authority to purely executive officials and thus countermanding discharge of FTC Commissioner).

Under the so-called Decision of 1789, the First Congress determined that the President was constitutionally empowered to remove at-will executive officers such as the Secretary of Foreign Affairs. *See Myers*, 272 U.S. at 111-36. The tradition can be traced to the period under the Articles of Confederation. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 68-70.

29 President Andrew Johnson vetoed the Tenure of Office Act on the ground that restricting the President's removal authority unconstitutionally infringed upon his powers to direct execution of the laws. Even after Congress overrode the veto, Johnson refused to accede to the law, and this dispute helped precipitate impeachment proceedings. M. BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 95-111 (1973); M. LOMARK, ANDREW JOHNSON: PRESIDENT ON TRIAL 289-93 (1960). For a more general discussion of the President's removal authority, see Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 31-32 (addressing ideal of unitary Presidency).

> committed ought to be considered as the assistants or deputies of the Chief Magistrate, and on this account they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence.[30]

The power to remove an official is emblematic of a continuing relationship between the President and subordinate officials and, in the public eye, links that official's conduct to the Presidency itself.[31]

To be sure, the Court in *Morrison* and *Mistretta* recently upheld delegations of executive authority to officials outside the President's immediate supervision—in *Morrison*, to the independent counsel appointed by the special division of the Court of Appeals for the District of Columbia,[32] and in *Mistretta*, to a commission located in the judiciary and comprised, in part, of article III judges.[33] In both cases, the Court concluded that Congress can constitutionally remove some law implementation functions from the President's plenary control. The Court in *Morrison*, however, emphasized that the President's power to remove "for cause" those officials exercising executive power provided, at least in part, the requisite executive control to justify the seeming intrusion into the executive branch's prerogatives.[34] No such control may exist with delegations outside the federal government, and without at least the power to remove officials for cause, the President's ability to carry out his constitutional functions would be limited indeed. In the mine safety hypotheticals, the Executive could well lose its ability to coordinate national policy if Congress delegated the power to set standards outside the federal government.

The President's article II supervisory powers—both the power to appoint and the power to remove officers exercising executive responsibilities—are not merely designed to safeguard executive branch power, they also serve in the long run to protect individual liberty. To ensure that public power is exercised in a responsible way, the President must be made formally accountable for the exercise of the sweeping powers delegated by the legislative branch. Public officials may then be called to account for any subsequent abuse of public authority.[35]

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30 THE FEDERALIST NO. 72, at 435-36 (A. Hamilton).

31 Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491, 506-14 (1987); Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 279 (1982); Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. U.L. REV. 1064, 1105 (1981); Strauss, *supra* note 24, at 599.

32 28 U.S.C. § 392(c).

33 28 U.S.C. § 991 (Supp. IV 1986).

34 108 S. Ct. at 2619; *see also Mistretta*, 109 S. Ct. at 666 (emphasizing that President could remove all members of the Sentencing Commission, including the article III judges, for cause).

35 Indeed, some members of the Supreme Court (*see* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting, with Burger, C.J., joining); Industrial Union Dep't AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring in the judgment); Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974) (inter-

The lack of accountability suggests two interrelated concerns. First, public policy is likely to be formulated without the constitutional checks that are principally designed to ensure "public-regarding" legislation. Policy emanating from Congress benefits from the leavening process of bicameralism and presentment. No legislative act can bind those outside Congress unless two houses of Congress agree, make their agreement public, and are willing to jeopardize political capital by presenting that agreement to the President for approval.[36] Although policy set through delegation to the executive branch is not similarly leavened, the President remains accountable to the electorate for formulation of that policy. Congress in turn checks the President's actions through oversight hearings, appropriation decisions, its power to withdraw the delegation, and by requiring judicial review.[37] Thus, if Congress fashions policy itself or delegates authority to the executive branch, the ultimate policy adopted

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preting statute to limit extent of delegation to avoid constitutional problems)), as well as many academics (*see, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 130-34 (1980); J. FREEDMAN, CRISIS AND LEGITIMACY 78-94 (1978); T. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed. 1979); Aronson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345 (1987); Koslow, *Standardless Administrative Adjudication*, 22 ADMIN. L. REV. 407 (1970); Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U.L. REV. 295 (1987); Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U.L. REV. 355 (1987); Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223 (1985); Stenzel, *Toxic Substance Regulation: A Compelling Situation for Revival of the Delegation Doctrine*, 24 AM. BUS. L.J. 81 (1986). *But see* Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 1 (1985) (arguing that delegation may in fact enhance public-regardedness of eventual policy chosen); Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 388-97 (1989) (arguing for delegations as long as accompanied by sufficient legislative communication concerning goals and possible implementing strategies)) have increasingly lobbied for a reinvigorated nondelegation doctrine largely out of the fear that independent agencies are unaccountable to the public for their exercise of power. Delegates outside the federal government may be even less accountable for their exercise of public authority than are independent agencies, and Congress may make such delegations in order to avoid assuming responsibility for a politically sensitive decision.

[36] *Chadha*, 462 U.S. at 919; *see also* Krent, *supra* note 11, at 1266; Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982); Scalia, *The Legislative Veto: A False Remedy for System Overload*, 3 REG. 19 (1979).

[37] Congress may shield the acts of private parties from judicial review, and the Constitution does not of its own accord necessarily constrain private conduct. Although some private regulators are subject to constitutional requirements by virtue of the state action doctrine, the Supreme Court has been grudging in subjecting the acts of private parties to constitutional constraint. *See, e.g.*, Deshaney v. Winnebago County Dep't of Social Serv., 109 S. Ct. 998 (1989); NCAA v. Tarkanian, 109 S. Ct. 454 (1988); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 543-47 (1987) (United States Olympic Committee is not a state actor despite the fact that it is a corporation chartered and regulated by the federal government, receives direct subsidies from the government, and was given exclusive commercial use of the word "Olympic" by statute); Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-58 (1974) (termination of service by a heavily regulated utility granted partial monopoly by the state is not state action).

is the product of at least two branches of government and is subject to the continuing check of at least one other coordinate branch.

In contrast, delegations of authority outside the federal government may be virtually unrestrained. Although the initial delegation decision must be made with the concurrence of Congress and the President, subject to a congressional override, the ultimate implementation of government policy is unchecked in a constitutional sense. The policy need not be molded through bicameralism and presentment, nor is the delegate itself necessarily subject to electoral accountability or presidential supervision. Furthermore, no branch may be able to monitor implementation of that policy effectively. The checks and balances applicable to legislation or to the executive branch's exercise of delegated authority are simply not present. The ultimate result may be arbitrary or unreflective governance.[38] Delegates outside the federal government are thus unlikely to be as publicly accountable for their exercise of authority as are members of Congress or the executive branch.

Second, delegations outside the federal government may remove a fundamental check upon delegation in general—that Congress must be willing to permit the executive branch to implement or execute that policy. Although Congress may wish to escape responsibility for a politically charged decision, it may be reluctant to transfer that authority to the executive branch. Sanctioning delegations outside the federal government may therefore facilitate Congress' efforts to avoid tackling sensitive policy issues, and there is little reason to hope that public policy will thereby benefit.[39]

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[38] Delegates outside the federal government may not only be politically unaccountable, they also need not comply with the welter of regulations checking the conduct of executive agencies and employees. Nearly all executive agencies must adhere to the disclosure requirements of the FOIA, 5 U.S.C.A. § 552 (West Supp. 1989) (imposing extensive disclosure requirements on covered agencies), and to the oversight of such watchdog federal agencies such as the GAO, 31 U.S.C. § 712 (West 1982) (imposing duty to investigate "all matters related to the receipt, disbursement, and uses of public money," including conducting audits of expenditures by federal agencies "to help Congress decide whether public money has been used and expended economically and efficiently"), and the OMB. Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (requiring agencies to send all proposed and final regulations to OMB for prepublication review). In addition, federal employees—unlike most of their counterparts outside the federal government—are subject to conflict of interest and reporting requirements. *See, e.g.*, Exec. Order No. 11,222, § 202, 3 C.F.R. § 306, *reprinted as amended*, 18 U.S.C.A. § 201 note (West Supp. 1989); *id.* § 203(a); *id.* § 203(b); *see also* Ethics in Government Act, 5 U.S.C.A. App. 4 §§ 201-12 (West Supp. 1989) (constraining conduct of senior executive branch officials). *See also In re* Sealed Case, 838 F.2d 476, 514 (D.C. Cir. 1988) (during the recent independent counsel investigations of senior Reagan Administration officials, independent counsel vigorously challenged whether they could be considered part of the Department of Justice in part because of the impact the federal conflict-of-interest laws would have on their staff), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988). As a practical matter, therefore, delegations to the executive branch are accompanied not only by the formal protection of presidential supervision, but also by the practical protections of congressional regulations circumscribing the executive branch as a whole.

[39] Aranson, Gellhorn & Robinson, *supra* note 35. It is even conceivable that Congress may

The dangers attendant upon circumventing article II are interrelated: the private delegates may be insufficiently accountable for their exercise of "public" power, and Congress may possess greater incentive to avoid responsibility for thorny policy decisions. Executive supervision helps ensure, at least to some degree, that public policy will be exercised in a public-regarding fashion.

*2. Congress' Circumscribed Powers Under Article I.*—Aside from the possible encroachment into the President's article II powers, congressional delegation of authority outside the federal government may allow Congress to shape government policy without subjecting that policy to the article I checks of bicameralism and presentment.[40] By forcing all legislative acts to receive the imprimatur of two houses of Congress and the President (subject to congressional override), the constitutional restraints on action arguably promote more public-regarding legislation and minimize direct confrontation among the branches.[41] If congressional delegations outside the federal government permit Congress to control the delegated authority, then the delegations run afoul of the article I restrictions.

The Supreme Court's decision in *Bowsher v. Synar*,[42] invalidating the Comptroller General's role under the Gramm-Rudman-Hollings Act,[43] is illustrative. Under the Act, Congress authorized the Comptroller General, based upon economic forecasts proposed by the Office of Management and Budget and the Congressional Budget Office, to specify the spending reductions necessary to keep the budget deficit within the limits set by Congress. Although the President appoints the Comptroller General to a fifteen-year term of office, Congress made the Comptroller General removable at the initiative of Congress for any one of several causes.[44] The Court held that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws."[45] The Court explained that "once Congress makes its choice in enacting

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delegate authority outside the federal government precisely because it is easier to assure that so-called private goods (legislation benefiting special interest groups) will be created through such delegations as opposed to those to the executive branch. Where opposition to the private goods is spread diffusely among the public, and support for the goods is concentrated in a special interest group, Congress may be particularly likely to help create private goods. Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357, 358-59 (1980).

40 In *INS v. Chadha*, 462 U.S. 919 (1983), the Supreme Court invalidated the legislative veto principally on the ground that Congress can only make binding policy by following the article I requirements of bicameralism and presentment. In *Bowsher v. Synar*, 478 U.S. 714 (1986), Congress subsequently held that, in light of *Chadha*, Congress could not, through an agent, participate in execution of the laws.

41 Krent, *supra* note 11, at 1261-72.

42 478 U.S. 714 (1986).

43 2 U.S.C. §§ 901-07 (Supp. IV 1986).

44 *Bowsher*, 478 U.S. at 727-32.

45 *Id.* at 726.

legislation, its participation ends. Congress can thereafter control the execution of enactments only indirectly—by passing new legislation."[46] Recognizing in Congress the power to remove—or appoint—officers would permit Congress to breach the article I procedures meant to circumscribe its authority.[47]

Delegating authority outside the federal government may permit Congress to exercise both a de facto appointment and removal authority. With respect to appointment, Congress and not the President decides the identity of the delegate.[48] In functional terms, Congress both creates the office and designates the officeholder. Congress thus can accomplish, albeit indirectly, the very combination of powers specifically withheld from it under the Constitution.[49]

With respect to removal, Congress may "remove" a delegate outside the federal government merely by passing a new law abolishing the office or changing the identity of the delegate.[50] Although such law would need

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[46] *Id.* at 733-34.

[47] *Buckley* of course forbids Congress to appoint officers of the United States. 424 U.S. at 118-40; *see also* Springer v. Philippine Islands, 277 U.S. 189 (1928) (Congress breaches its article I restrictions when it engrafts executive functions onto a legislative office and thereby assumes the President's appointment power); Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision, 732 F. Supp. 1183, 1193 (D.D.C. 1990) (When Congress "abolished one agency and removed its three officers, yet designated one of the three as the head of the newly-created successor agency, Congress exercised the kind of decisionmaking about who will serve in Executive Department posts that the Constitution says it cannot.").

[48] With respect to delegations to agencies within the executive branch, Congress may designate which executive branch agency is to exercise the delegated authority, but can reserve for itself no direct role (aside from Senate consent) in determining who is to head that agency. In contrast, Congress can specifically identify the individual or entity outside the government which is to exercise delegated authority.

[49] The framers ultimately decided to split the power to create and fill offices. Because only Congress—through its exercise of article I powers—can create offices, permitting Congress to fill those offices with personnel of its own selection might lead to high-handed measures. As James Madison stated in the First Congress:

> The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the Legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an Executive nature. . . . [W]e shall readily conclude that if the Legislature determines the powers, the honors, and emoluments of an office, we should be insecure if they were to designate the officer also.

Myers v. United States, 272 U.S. 52, 128-29 (1926) (citing 1 ANNALS OF CONGRESS 581, 582). The function of the appointments clause, therefore, is to protect against arbitrary rule by placing control over execution of the laws in the Executive and thereby counteracting Congress' power to create any office (and fashion any policy) it deems appropriate.

[50] Although the threat of withdrawing a delegation gives Congress some influence over executive branch officers, withdrawal does not usually terminate the executive officer's status, as it would with a private delegate. If Congress attempts to abolish an entire office in the executive branch, it presumably cannot then recreate a similar office—otherwise it would usurp the President's removal authority. *See, e.g., Hearings on Confirmation of the Director and Deputy Director of the Office of Management and Budget Before Subcomm. of the House Comm. on Gov't Operations*, 93d Cong., 1st Sess. 7, 69 (1973) (Congress considered requiring incumbent director of OMB to be confirmed despite the fact that the office, as formerly constituted, required no confirmation); *cf. Olympic Fed. Sav.*

a two-thirds vote in each House if vetoed by the President, the prospect of congressional removal exists, and the private delegate would be aware of that power. The Supreme Court, in the analogous context of *Bowsher*, determined that "in constitutional terms, the removal powers over the Comptroller General's office dictate that he will be subservient to Congress."[51] The absence of executive branch controls increases the possibility that the delegate outside the federal government will heed Congress' will. To the extent there is supervision of the private enforcement of federal laws, the supervision would more likely come from Congress than from the Executive.

Consider a hypothetical statute delegating authority to the head of the Brookings Institute to perform the budget cutting duties assigned by Congress in the Gramm-Rudman-Hollings Act.[52] If the head of the Brookings Institute exercised such power, Congress could participate in the execution of the laws even more effectively than it could by vesting those same responsibilities in the Comptroller General. While the Comptroller General is appointed by the President, the head of the Brookings Institute would be beholden only to Congress, and would presumably more directly reflect Congress' views. Congress could exercise a de facto removal authority merely by revising the statute (subject to presidential veto and the need for two-thirds override). The delegate would know that it owed its authority to Congress, and would likely conform its actions in light of that knowledge. Thus, delegations of governmental authority outside the federal government may permit Congress to participate in executing the laws. Viewed another way, private delegates may, in certain circumstances, be considered agents of Congress.

From a theoretical perspective delegations outside the federal government threaten the values of accountability and balance underlying our system of separated powers.[53] If the Executive cannot superintend implementation of the laws, no public official is accountable for the exercise of delegated authority. At the same time, to confer policymaking authority on an individual primarily accountable to Congress places in Congress'

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*& Loan*, 732 F. Supp. at 1193 (Congress cannot terminate agency headed by three commissioners and reconstitute it with only one commissioner without running afoul of separation of powers doctrine). In any event, there is more of a check preventing Congress from abolishing an entire office in the executive branch since Congress would then have to exercise the previously delegated authority itself or redelegate that authority to another executive branch official.

[51] *Bowsher*, 478 U.S. at 730.

[52] 2 U.S.C. §§ 901-07 (Supp. IV 1986).

[53] Delegations outside the federal government may not necessarily lead to arbitrary governance and, despite the limited executive role, such delegations may at times yield more "public-regarding" policy than if the authority had instead been delegated to the President or discharged by Congress itself. Yet those adhering to the Supreme Court's view of the separation of powers doctrine would stress that the constitutional checks designed to protect against "factionalized" or narrow interest legislation are not present. Those checks, even if not necessarily embodying the most efficient way to ensure public-regarding legislation, reflect the constitutional means to protect, in the long run, against arbitrary rule.

hands the power to both make and enforce the law. It was, of course, that experience during the period preceding the Constitutional Convention which in part led the framers to adopt and the voters to ratify a different governmental structure in the Constitution. Congressional delegations of authority outside the federal government, in a most fundamental way, call into question our system of separated powers.

## II. TRACING PRIOR CONGRESSIONAL DELEGATIONS OF AUTHORITY OUTSIDE THE FEDERAL GOVERNMENT

In this Section, I will focus, from a purely descriptive vantage point, on the contexts in which Congress has authorized persons or entities outside the federal government to exercise administrative power. Although the bulk of such delegations has been to states and state officials, Congress has also vested private individuals and entities with a wide panoply of governmental powers. Congress has delegated authority to private individuals serving in government agencies, to private "experts," to private groups targeted by federal regulation, and to private attorneys general. Although the examples illustrate that Congress generally has permitted the Executive to superintend the delegated authority, and that Congress has not retained for itself indirect control, the examples also highlight that formal and practical control on occasion have been removed from the executive branch.

### *A. Delegation to States*

The most visible and pervasive examples of congressional delegations outside the federal government lie in joint federal-state programs. Congress has long fashioned partnerships with states to implement federal programs and to enforce federal law.[54] In all, the congressional delegations of authority to state governments and officials are quite considerable. Congress has approved state compacts,[55] shared responsi-

[54] Despite the examples, the Supreme Court on several occasions has stated that Congress cannot delegate its powers to the states. *See, e.g.*, Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164 (1920); *In re* Rahrer, 140 U.S. 545, 560 (1891).

[55] In theory, Congress must approve any agreement between two or more states which addresses multistate concerns. States would be ill equipped to tackle regional projects without the cooperation of other states, and the Constitution requires congressional assent to all such projects: "[W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause." Cuyler v. Adams, 449 U.S. 433, 440 (1981). Federal judicial interpretation of a compact controls a state's application of its own laws through the supremacy clause.

The administrative-type authority wielded by some compacts is exemplified by the Northwest Power Planning Council, an interstate compact of Idaho, Montana, Oregon, and Washington. Congress directed that the compact would come into existence upon agreement of any three of the four states. Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839b(a)(2) (1982). *See generally* Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conserva-

bility with states in implementing federal programs,[56] and authorized state officials directly to enforce federal law.[57] States *qua* states and state

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tion Planning Council, 786 F.2d 1359 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987). The Council, composed of two members appointed by the governors of each state, prepares a conservation and energy usage plan for the region and develops a program for energy planning consistent with environmental concerns. All four states agreed to participate, and Congress approved the compact. Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, 94 Stat. 2697 (1980) (codified at 16 U.S.C. §§ 839-839h (1982)).

Congress had previously charged a federal agency, the Bonneville Power Administration (BPA), with the duty to market and distribute power primarily in the Pacific Northwest. Bonneville Project Act, 16 U.S.C. § 832a, 837a-837b (1982). In order to make a "major" power acquisition, the BPA must make a written determination that its planned action is consistent with the Council's energy plan and conservation program. 16 U.S.C. § 839d(c)(2)(A); *Seattle Master Builders*, 786 F.2d at 1376 (Beezer, J., dissenting). If the Council disagrees and determines that the acquisition is not consistent, it in effect vetoes the BPA plan, pending congressional intervention. Moreover, the Council may veto any planned increased sales of power by BPA to direct-service industrial customers, 16 U.S.C. § 839c(d)(3) (1982), and the BPA's authority extends beyond the borders of the four states represented on the Council. 16 U.S.C. § 839a(14)(A) & (B) (1982). Thus, not only can member states (through the Council) bind dissenting states, but they can also block major resource acquisitions by a federal agency. Pursuant to the compact clause, therefore, Congress delegated significant administrative authority directly to affected states.

[56] Many federal social welfare projects delegate power to state entities. For instance, Congress has delegated substantial authority to the states to administer the Medicaid program, Title XIX of the Social Security Act, Pub. L. No. 89-97, 79 Stat. 343 (1965) (codified as amended at 42 U.S.C.A. §§ 1396-1396s (West Supp. 1989)), which the Supreme Court has described as "a cooperative endeavor in which the Federal Government provides financial assistance to participating States to aid them in furnishing health care to needy persons." Harris v. McRae, 448 U.S. 297, 308 (1980). Although the Medicaid statute sets binding federal rules, 42 U.S.C.A. § 1396a(a) (West Supp. 1989), and the Secretary of Health and Human Services issues regulations expanding their reach, 42 C.F.R. §§ 430-56 (1988), each participating state must develop its own program describing conditions of eligibility and covered services. *See also* Aid to Families with Dependent Children, 42 U.S.C.A. §§ 601 *et seq.* (West Supp. 1989) (As with Medicaid, a state electing to receive federal funding must submit a plan complying with the requirements of the AFDC statute, and if the plan complies, the Secretary of Health and Human Services must approve and fund the plan); The Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (Congress delegated to states the authority to formulate and then implement plans to attain national ambient air quality standards, and although the state implementing plans are subject to EPA approval, as long as states meet the national standards, their decisions as to the appropriate mix of control devices, as to the concentration of various pollutants within different parts of the state, and as to whether certain industries merit special treatment are binding. *See generally* Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 79 (1975) ("[EPA] plainly . . . is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission standards which are necessary if the national standards it has set are to be met."); *cf.* FERC v. Mississippi, 456 U.S. 742, 775, 781 n.8 (1982) (O'Connor, J., dissenting) (Congress "commandeer[ed] state utility commissions" to implement the Natural Gas Act, when it could have chosen national officials as its delegate).

[57] In one of the first statutes enacted under the Constitution, the Judiciary Act of 1789, Congress authorized state justices of the peace and magistrates to arrest those suspected of violating federal criminal provisions. Judiciary Act of 1789, § 33, 1 Stat. 73, 91. Congress has maintained the delegation to this day. 18 U.S.C.A. § 3041 (West 1985); *see* United States v. Bowdach, 561 F.2d 1160, 1167-68 (5th Cir. 1977) (holding that Congress has authorized state law enforcement officers to arrest for federal crimes); Whitlock v. Boyer, 77 Ariz. 334, 337-38, 271 P.2d 484, 487 (1954) (holding that municipal police officer had authority to arrest for federal crime).

The first Congress also vested in state justices of the peace the power to arrest and detain

officials enjoy wide-ranging authority to implement and enforce federal statutory provisions.[58] Indeed, it is hard today to conceive of a federal welfare program that does not depend substantially upon state discretion. In choosing to vest in states the authority to implement federal programs, Congress has placed significant segments of federal law enforcement and implementation outside the federal government and frequently outside the executive branch's practical control.[59]

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deserting seamen. Act of July 20, 1790, ch. 29, § 7, 1 Stat. 131, 134; *see Ex parte* Pool, 4 Va. (2 Va. Cas.) 276, 278-80 (1821) (upholding Congress' delegation of powers). Similarly, under the Fugitive Slave Act of 1793, ch. 7, § 3, 1 Stat. 302, 302-05, and under the Alien Enemy Act of 1798, ch. 66, § 2, 1 Stat. 577, 577-78, Congress directed state magistrates to arrest alleged fugitives, and to determine whether to permit their removal from the jurisdiction.

Moreover, Congress has at times delegated to state officials the power to restrain violation of federal criminal law. Under the Volstead Act, Act of Oct. 28, 1919, Pub. L. No. 66-66, 41 Stat. 305, 314-15, for example, Congress directed state officials to sue in equity on behalf of the United States to restrain violation of criminal laws concerning prohibition. As one state court noted in upholding the delegation, the right of the state official "to proceed in the name of the United States is given by the Volstead Act. There can be no doubt of the right of the United States to avail itself of the law officers of the state for the purpose of enforcing the act of Congress." Carse v. Marsh, 189 Cal. 743, 746, 210 P. 257, 258 (1922).

More recently, Congress in the Medical Waste Tracking Act, Pub. L. No. 89-272, tit. 11, 102 Stat. 2950, authorized states to impose civil penalties for violation of any requirements in the Act. 42 U.S.C. § 6992(f). Indeed, the Act apparently authorizes states to bring criminal prosecutions under federal law. *See* 24 Weekly Compilation of Presidential Documents 1415 (Nov. 7, 1988) (upon signing the bill, President Reagan adverted to possible unconstitutionality of this provision).

[58] Just as Congress has delegated authority to state governments, it has delegated administrative power to Indian Tribes. Congress has long recognized that Indian Tribes possess a substantial measure of sovereignty in regulating their internal relations. *See, e.g.*, Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 686-87 (1965) ("[F]rom the very first days of our Government, the Federal Government has been permitting the Indians largely to govern themselves. . . ."). But Congress has also delegated to Indian Tribes the power to bind outsiders who trade with the Tribes or live in designated reservations. For instance, Congress has delegated the authority to Indian Tribes to adopt ordinances controlling introduction by non-Indians of alcoholic beverages into non-Indian land within an Indian Reservation, so long as state law was not violated and so long as the regulation was "certified by the Secretary of the Interior." Act of Aug. 15, 1953, ch. 502, § 2, 67 Stat. 586 (codified as amended at 18 U.S.C. § 1161 (West Supp. 1989)). That grant of authority extends to non-Indian held land within the reservation's boundaries. The Supreme Court has explained that "Congress contemplated that its absolute but not exclusive power to regulate Indian liquor transactions would be delegated to the tribes themselves. . . ." Rice v. Rehner, 463 U.S. 713, 728 (1983). In *Mazurie v. United States*, 487 F.2d 14, 18 (10th Cir. 1973), *rev'd sub nom.* United States v. Mazurie, 419 U.S. 544 (1975), the Tenth Circuit reversed the defendant's conviction for selling liquor without obtaining a license from the relevant Indian authorities, reasoning in part that

> Congress cannot delegate its authority to a private, voluntary organization, which is obviously not a governmental agency, to regulate a business on privately owned lands, no matter where located. It is obvious that the authority of Congress under the Constitution to regulate commerce with the Indian Tribes is broad, but it cannot encompass the relationships here concerned.

The Supreme Court disagreed, emphasizing that the Indian Tribes "possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life." 419 U.S. at 557.

[59] Similarly, by incorporating state law, Congress has permitted the legislators of individual states to set binding federal policy at the same time that state law is formulated. For instance, to

The Constitution offers some justification for the delegations to states and state officials. Article I provides that Congress can consent to state decisions to levy "duty of tonnage, [to] keep troops, or ships of war in time of peace, [or to] enter into an[] agreement with another state or with a foreign power or engage in war."[60] This constitutional provision has been only rarely invoked (with the exception of the compact clause), yet the possibility of delegating authority outside the federal government exists within the constitutional framework.[61] Congress apparently can, under the Constitution, consent or direct states to act in capacities which we associate today exclusively with the executive branch.

Delegations to the states, however, extend considerably beyond those directly encompassed by the constitutional text. Joint federal-state programs, and delegations to state officials to enforce federal law, are not examples of the congressional "consent" provided for in article I, section 8.[62] Delegations to states can rather be understood—if at all—as further-

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determine the tort liability of federal officers acting under federal law, Congress provided that "the United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C. § 2674. In other words, Congress delegated the power to the 50 state legislatures to fashion liability standards circumscribing federal employees' conduct.

The Federal Assimilative Crimes Act analogously provides that

> [w]hoever within [any federal enclave] is guilty of any act or omission, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 13. Congress in essence has delegated to the states a sliver of its own power to proscribe criminal conduct, and as state assessment of that conduct changes, so automatically does that of the federal government. *See also* 16 U.S.C. § 3372(a)(2)(A) (making it a federal crime to buy, sell, or transport fish which have been bought, sold, or transported in violation of state law). Congress has followed a comparable course on other occasions. *See In re* Rahrer, 140 U.S. 545 (1891) (upholding incorporation of state prohibition law); *Ex parte* Siebold, 100 U.S. 371 (1879) (incorporating state election laws); *see also* California v. United States, 438 U.S. 645, 653-70 (1978) (federal reclamation projects must follow state water laws); Hancock v. Train, 426 U.S. 167, 184-90 (1976) (federal government must comply with some state air pollution standards). Binding federal laws therefore have been formulated outside Congress without the supervision or control of the executive branch.

60 U.S. CONST. art. I, § 10.

61 The consent provision, although apparently not the subject of much discussion at the Constitutional Convention, stems from a similar section in the Articles of Confederation. Because of Congress' comparative impotence in that period, its power to withhold consent to any alliance among the states or any agreement between a state and foreign power was critical. In turn, its consent acted as a type of delegation to the states to carry out national objectives.

In *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840), for example, the Supreme Court confronted the question whether Vermont could agree with Canadian authorities to extradite fugitives in the absence of congressional sanction. Although there were five separate opinions for the Court, a majority of the eight Justices participating evidently concurred in Chief Justice Taney's reasoning that the extradition agreement was illegal, but could be rectified by congressional consent. *Id.* at 578. States thus can exercise some power over foreign affairs, as long as Congress consents. No concern for exclusive *executive* control was voiced.

62 Although congressional consent under article I, § 10 may differ from congressional delegations in form, they are quite close in substance. Both place the coercive power of the federal govern-

ing the federalism values implicit in our constitutional framework[63] and more explicit in our nation's history. Such delegations suggest that interests in federalism can override the article II interest in exclusive executive control of administrative authority delegated by Congress.

### *B. Direct Delegations to Private Individuals and Groups*

Congressional delegations of administrative authority to private groups and individuals are more unexpected. Private individuals and groups have exercised such power both "in" and outside of the federal government. There may be various advantages to placing private parties in positions of power: Congress may try to ensure that a particular viewpoint is represented, tap the expertise of private individuals who would otherwise not agree to serve as government officials, remove barriers to operation of the private market, or generate greater respect for a particular regulatory program by including representatives of those regulated. Although some executive controls generally remain, the private individuals—who are neither appointed nor removable by the President—unquestionably have exercised administrative authority.

*1. Delegation to Private Individuals as Part of Government Agencies.*—Private individuals exercise power by serving in a number of governmental agencies.[64] For instance, Congress provided for private representation on the Federal Open Market Committee (FOMC), which operates as part of the Federal Reserve System.[65] The private members are elected annually by the boards of directors of the twelve regional Federal Reserve Banks, which are privately owned.[66] Although the pri-

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ment behind policies formulated and implemented by Congress' delegates. Congressional consent to state regulation of commerce that otherwise would run afoul of the dormant commerce clause, though analogous in some respects, does not transform state regulation into federal law, *In re* Rahrer, 140 U.S. 545, 561 (1891), and congressional consent to state taxation of its instrumentalities similarly does not give rise to federal law. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 438 n.51 (1946).

63 The scheme of enumerated powers, provisions such as the individual election of senators, art. I, § 3, and the ninth and tenth amendments reflect the role that the states were to play in the new constitutional system.

64 The examples in state governments are more numerous. *See, e.g.*, Evers v. Board of Medical Examiners, 516 So. 2d 650 (Ala. Civ. App. 1987) (Board included private medical personnel); Humane Soc'y v. New Jersey State Fish and Game Council, 70 N.J. 565, 362 A.2d 20 (1976) (sustaining presence of private individuals on government agency); United Farm Workers v. Arizona Agric. Employment Relations Bd., 727 F.2d 1475 (9th Cir. 1984) (en banc) (Board included representatives from management and labor).

65 Banking Act of 1935, ch. 614, § 205, 49 Stat. 705 (codified as amended at 12 U.S.C. § 263 (1989)).

66 The Federal Reserve System functions on three rough levels: the seven-person Board of Governors, which is a public entity vested with the authority to supervise and regulate the entire Federal Reserve System; the 12 regional Federal Reserve Banks which are privately owned; and the privately owned member banks. The FOMC is comprised of the seven-person Board of Governors and five private members who must be either presidents or vice-presidents of Federal Reserve Banks. The

vate members of the FOMC comprise a minority of the committee, they discharge an immensely important policymaking role. Congress charged the FOMC with complete control over the purchase and sale of government securities in the open market, and thus with decisive influence over interest rates. Yet the private individuals on the FOMC are not immediately accountable to any public official for their exercise of statutory authority. They owe loyalty instead to the private Federal Reserve Banks.[67] Private individuals, therefore, have participated significantly by serving in government agencies and discharging government functions without being directly accountable to the public for their actions.[68]

*2. Delegation to "Expert" Private Groups Outside Government.*— Congress has also authorized private groups outside the federal government to exercise administrative authority. Just as with delegations to private individuals serving in government agencies, such delegations re-

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presidents and vice-presidents are originally appointed to their positions of authority by the respective boards of directors of the Federal Reserve Banks, subject to approval by the Board of Governors. Some executive branch influence thus exists. The Board of Governors, however, has no role in determining which individuals are elected to serve on the FOMC. The Board of Governors may also suspend or remove officers of the Reserve Banks for cause, though not specifically for conduct while serving on the FOMC. 12 U.S.C. § 248(f) (1989). *See generally* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS (7th ed. 1984); Note, *The Federal Open Market Committee and the Sharing of Governmental Power with Private Citizens*, 75 VA. L. REV. 111 (1989).

67 Despite the considerable role played by the private individuals in shaping the nation's financial policies, challenges to the private exercise of authority have so far been rejected. Melcher v. FOMC, 644 F. Supp. 510 (D.D.C. 1986) (sustaining delegation), *aff'd on other grounds*, 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988). *But see* Note, *supra* note 63 (arguing that delegation is unconstitutional). Nor are their actions likely to be subject to judicial review. In a series of cases, the Court of Appeals for the D.C. Circuit has held suits challenging the agency's composition and acts to be nonreviewable. *See Melcher*, 836 F.2d at 563-65 (dismissing challenge by senator on grounds of equitable discretion); Committee for Monetary Reform v. Board of Governors of the Fed. Reserve Sys., 766 F.2d 538 (D.C. Cir. 1985) (dismissing challenge by private organization and individuals for lack of standing); Riegle v. FOMC, 656 F.2d 873 (D.C. Cir. 1981) (dismissing challenge by member of Congress on grounds of equitable discretion), *cert. denied*, 439 U.S. 997 (1978); *cf.* Bryan v. FOMC, 235 F. Supp. 877 (D. Mont. 1964) (challenge by private individual dismissed for lack of standing).

68 Private individuals have also served on the boards of many governmental corporations. For instance, in setting up CONRAIL and AMTRAK in 1973, Regional Rail Reorganization Act of 1973, 45 U.S.C. 701 *et seq.*, Congress created an umbrella organization, the United States Railway Association, to study reorganization of the rail system, to issue bonds, monitor the performance of CONRAIL, and provide assistance to state and local regional transportation authorities. 45 U.S.C. § 711, Pub. L. No. 93-236 Title VII, § 201, 87 Stat. 988 (1974). Originally, Congress established an eleven member board of directors, comprised of three "government" members and a chairman appointed by the President with the advice and consent of the Senate, and non-government members selected by the President from a short list presented by groups including the AFL-CIO and the Association of American Railroads. The Board is now composed of five members, including the Comptroller General. The legality of the Comptroller General's role on the Board of Directors is open to question after *Bowsher*. Congress plainly intended that the non-government members share in the association's exercise of executive-type responsibilities.

flect congressional efforts to rely on expertise developed in the private sector. For example, private health organizations have played an important role in various social security programs.[69] Under the Medicaid statute, Congress delegated to the Joint Committee on Accreditation of Hospitals (JCAH), a not-for-profit corporation formed to create professional standards and evaluate hospital performance, at least some responsibility for determining whether to accredit hospitals and thereby permit patients in such hospitals to receive Medicare, Medicaid, and social security benefits.[70] JCAH determinations are not subject to revision by the Department of Health and Human Services.[71] This delegation represents just one instance in which Congress has determined that private individuals would be more "expert" than executive branch officials in carrying out legislative objectives.

*3. Delegation to Affected Groups of Private Citizens.*—Some congressional delegations permit groups targeted by a particular set of regulations to participate in formulating the content of the regulations. Although no private individual exercises substantial authority, the group as a whole—through either a referendum or some other representative process—helps determine both the applicability and substance of federal regulation. In turn, the group's actions are binding on dissenters within the groups as well as on some outsiders.

The Agricultural Marketing Agreement Act of 1937[72] presents a paradigm. With respect to milk, Congress authorized the Secretary of

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[69] Congress also relied upon private trustees to hold funds for members of Indian Tribes, recently emancipated by Congress, whom the Secretary of the Interior determined to be in need of assistance. Crain v. First Nat'l Bank, 324 F.2d 532, 537-38 (9th Cir. 1963). Congress delegated to private appraisers the authority to set binding values on imported merchandise. *See* Auffmordt v. Hedden, 137 U.S. 310 (1890).

[70] 42 U.S.C. § 1395x(f), (5) (1983), repealed by the Deficit Reduction Act of 1984, Pub. L. No. 98-369, Title VII § 2340, 98 Stat. 1093 (1984); 42 U.S.C. § 1395bb (1983 & Supp. 1990), amended by the Deficit Reduction Act of 1984, *supra*. One section formerly provided that "[t]he term[] . . . 'psychiatric hospital' means an institution which . . . is accredited by the Joint Commission on Accreditation of Hospitals." 42 U.S.C. § 1395x(f)(5). The Secretary was able to certify a distinct part of a psychiatric hospital as eligible despite the lack of accreditation of the hospital as a whole, but only if he determined that the distinct part of the hospital satisfied "requirements equivalent to [those set by the JCAH]." 42 U.S.C. § 1395x(f) (1983); *see* Cospito v. Heckler, 742 F.2d 72, 88 (3d Cir. 1984).

[71] Similarly, under the Hill-Burton Act, 42 U.S.C. §§ 291 *et seq.*, Congress provided that, before the Surgeon General could promulgate regulations to implement the congressional program providing hospital care for the indigent, and in particular to determine the priority of hospital construction and maintenance projects, as well as to determine construction standards, he first must obtain "the approval of the Federal Hospital Council," 42 U.S.C. § 291c, which includes private medical experts as well as representatives of consumer interests. Even though the private members of the Council are appointed by the Secretary of Health and Human Services, 42 U.S.C. § 291k, such private individuals share administrative responsibility with the Secretary of HHS in implementing the Hill-Burton program. *See* Corum v. Beth Israel Medical Center, 373 F. Supp. 550 (S.D.N.Y. 1974) (sustaining the delegation).

[72] 50 Stat. 246, codified at 7 U.S.C. §§ 601 *et seq.*

Agriculture under the Act to issue marketing orders setting minimum prices that handlers, who process dairy products, must pay to dairy farmers for milk products. Prior to setting the prices, the Secretary must conduct rulemaking and elicit public comment. But before any order can go into effect, it must be approved by the handlers of at least fifty percent of the milk covered by the proposed order and at least two-thirds of the producers in the covered area.[73] If the handlers withhold their consent, the Secretary may still promulgate the order if two-thirds of the affected dairy farmers concur.[74] Dairy farmers and, to some extent, handlers, can in effect veto any proposed milk marketing order, and the threat of a veto affords those groups some say in the formulation of the order.[75] Thus, Congress has chosen to delegate some responsibility for regulating the dairy industry[76] to the industry itself.

Producer groups for other commodities help determine not only production quotas, but also standards of quality, unfair trade practices,[77] and research and development agendas.[78] In turn, Congress has specified that marketing orders and implementation regulations, which cannot go into force without producer initiative and assent, automatically apply to

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73 7 U.S.C. §§ 608c(8), 608(c)(5)(B)(i) (1989).

74 The Secretary must also certify that the order is "the only practical means of advancing the interests of the producers." 7 U.S.C. § 608c(9)(B).

75 The Supreme Court has upheld the delegation. United States v. Rock Royal Cooperative, Inc., 307 U.S. 533, 577-78 (1939); H.P. Hood & Sons, Inc. v. United States, 307 U.S. 588, 599-603 (1939). The Act also delegated to wheat growers the power to reject wheat quotas set by the Secretary. Wickard v. Filburn, 317 U.S. 111, 115-16 (1942); United States v. MacMullen, 262 F.2d 499 (2d Cir. 1958). Similarly, the Tobacco Inspection Act of 1935 delegated to tobacco growers the power to veto the Secretary's designation of an auction market. Currin v. Wallace, 306 U.S. 1, 6 (1939).

76 Moreover, the Supreme Court has held that the order eventually adopted with the consent of the handlers and farmers is not subject to judicial review at the behest of consumers. Block v. Community Nutrition Institute, 467 U.S. 340, 346 (1984) ("The Act contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them. Handlers and producers—but not consumers—are entitled to participate in the adoption and retention of market orders.").

77 *See* 7 U.S.C. § 608 (1989); Marketing Agreements and Orders for Fruits and Vegetables 6-7 (U.S. Dep't of Agriculture 1987).

78 Congress has enacted at least 11 promotion and research programs for agricultural commodities over the past thirty years. All programs require the Secretary to conduct a referendum among producers of the product targeted for promotion before a program is effective and can be continued. Moreover, all research programs (with the exception of the wool program) provide for the creation of a governing board comprised of representatives of the industry to help fashion and implement the promotion and research activities. *See* 7 U.S.C. §§ 2901-04 (beef); 7 U.S.C. §§ 2102-18 (cotton); 7 U.S.C. §§ 2611-27 (potatoes); 7 U.S.C. §§ 2701-18 (eggs); 7 U.S.C. §§ 4501-38 (dairy products); 7 U.S.C. §§ 4601-12 (honey); 7 U.S.C. §§ 4801-19 (pork); 7 U.S.C. §§ 4901-16 (watermelon); 7 U.S.C. § 1787 (wool); 7 U.S.C. §§ 4301-19 (floral program ); 7 U.S.C. §§ 3401-17 (wheat program). All programs depend in part upon the participation and approval of the private sector. Such programs have survived delegation attacks. *See, e.g.*, United States v. Frame, 885 F.2d 1119, 1127-29 (3d Cir. 1989) (upholding beef program).

imports.[79] Thus, producer groups not only bind themselves (through referenda) with cartel-type agreements,[80] they bind outsiders as well.

Congress at times has invested in private groups more direct power to shape the content of the orders.[81] In the mid-nineteenth century, Congress—in one of the earliest examples of congressional delegation to groups of private citizens—delegated substantial authority to miners on federal government land to govern themselves. Congress provided that public lands were free and open to mineral exploration and occupation in part "subject . . . to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."[82] To a limited extent, Congress directed miners to

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[79] 7 U.S.C. § 608(e)-1 (1989); *see, e.g.*, Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971); Harry H. Price & Son, Inc. v. Hardin, 299 F. Supp. 557 (N.D.Tex. 1969).

[80] For another example, Congress directed the Secretary of Agriculture under the Agriculture Adjustment Act of 1938, 52 Stat. 63, through local committees, to establish acreage allotments and marketing quotas for producers of various commodities. Under the Act, which continues today, farmers within local administrative areas elect a local committee, which in turn elects representatives to serve on county committees. The county committees are vested with the power to increase, decrease, and reassign allotments for individual farmers. A farmer dissatisfied with the allotment could have had, and still today may "have such quota reviewed by a local review committee of three farmers appointed by the Secretary," and the decision of the private review committee is final, though subject to limited judicial review.

[81] The participation of private industry and labor groups was more widely utilized under the contemporaneous but now defunct National Industrial Recovery Act (NIRA). 15 U.S.C. § 703, 48 Stat. 195 (1933). Congress directed industry groups to adopt codes of fair competition which, upon approval by the President, bound the entire industry. The codes typically addressed questions of maximum hours, minimum wages, and various trade practices. Although the President retained the ultimate power to reject any proposed code, industry groups plainly exercised substantial power in formulating code provisions. In effect, the responsibility of private groups under the Act formed the mirror image of the responsibility exercised under the referendum cases—under the NIRA the President and not the private groups exercised the veto power. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-42 (1935) (invalidating the NIRA in part as an undue delegation of legislative authority and in part because of the broad discretion exercised by the groups in fashioning the codes).

Private individuals exercised an even greater degree of authority under the Bituminous Coal Act of 1935, 49 Stat. 991, the only enactment of Congress ever invalidated for delegating too much authority outside Congress. Under the Act, Congress authorized coal producers and miners to set maximum hours and minimum wages for the entire industry. Those producers not accepting the regulatory provisions would have incurred a prohibitive tax and would have been barred from contracting with the United States. The Court concluded that the delegation of such wide-ranging authority to private groups violated the due process clause. Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating Coal Act as violation of commerce clause and due process clause). Unlike the NIRA, which was invalidated in *Schechter*, Congress did not vest the power in the President to approve or disapprove the Codes.

[82] Act of July 26, 1866, § 1, 14 Stat. 251. In *Jennison v. Kirk*, 98 U.S. 453 (1879), the Supreme Court sustained the delegation, explaining that:

> Wherever [the miners] went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced. . . . These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines . . . [a]nd they were so framed as to secure to

participate in self-governance, and the product of that self-governance was enforceable through federal law.[83]

Finally, Congress recently delegated administrative authority to consumer representatives to oversee administration and operation of Dulles and National Airports. In the Metropolitan Washington Airports Act of 1986,[84] Congress sanctioned creation of a state compact to govern the two airports,[85] and provided that the board of directors of the Airports Authority be comprised of five members appointed from Virginia, three from the District of Columbia, two from Maryland, and one appointed by the President with the advice and consent of the Senate.[86] Congress directed that a board of review, comprised of members of Congress acting in their individual capacities as consumers of airport services, oversee actions of the board of directors in order to safeguard the

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all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the State.

*Id.* at 457.

*See also* Butte City Water Co. v. Baker, 196 U.S. 119, 127 (1905) (adverting to Congress' "power to delegate to a body of miners the making of additional regulations respecting location [of land boundaries]"); Erhardt v. Boaro, 113 U.S. 527 (1885) (addressing congressional delegation to miners); Jackson v. Roby, 109 U.S. 440 (1883) (resolving disputed claim by resort to congressional sanction of miners' custom); Basey v. Gallagher, 87 U.S. (20 Wall.) 670, 683-84 (1875) (relying upon custom of miners in Pacific Northwest to resolve water rights question). For a general discussion of law in mining camps, see C. SHINN, MINING CAMPS: A STUDY IN FRONTIER GOVERNMENT (1948).

As another example, Congress in 1893 delegated authority directly to the American Railway Association to establish a mandatory height for drawbars on railroad cars, Federal Railway Safety Appliances Act of 1893, 27 Stat. 531, and failure to comply with the height requirement subjected railroad companies to civil penalties. *See* Saint Louis, Iron Mountain, & Southern Ry. Co. v. Taylor, 210 U.S. 281, 285-87 (1908) (sustaining the delegation). Congress therefore permitted the private group targeted by the regulation to participate in implementing the congressional mandate, excluding the executive branch from that question of implementation.

83 More recently, to implement the Occupational Safety and Health Administration Act, 29 U.S.C. § 660, Congress directed the Secretary of Labor, on an interim basis, to promulgate any "national consensus standard" as an occupational safety or health standard. 29 U.S.C. § 655(a) (1989). Congress in turn defined "national consensus standard" in part as any standard which "has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption." 29 U.S.C. § 652(9). Congress evidently exempted the Secretary from following APA procedures when adopting standards of recognized private organizations such as the American National Standards Institute, Inc. and the National Fire Protection Association. S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970). As with the coal mine safety hypothetical in the introduction, Congress directed that privately developed standards serve as federal law, and the executive branch's role in setting those standards was minimal. The Secretary enjoyed the discretion to reject any private standard if he determined that the standard "would not result in improved safety or health for specifically designated employees." 29 U.S.C. § 655(a).

84 Pub. L. No. 99-591 (codified at 49 U.S.C. §§ 2451-2461 (1986 and West Supp. 1989)).

85 State compacts are treated as federal law. *See supra* note 55.

86 49 U.S.C. § 2456(e).

consumer interest.[87] The review board enjoys the power to veto any major action planned by the Airports Authority, including adoption of an annual budget, issuance of bonds, promulgation of regulations, adoption of development plans, and plans for land acquisition.[88]

In a great variety of situations, therefore, Congress has delegated authority to private groups to help regulate their own conduct or participate in regulation of activities affecting themselves. Although the delegations may largely have been narrow in scope, private entities have served, in essence, as partners with Congress and sometimes the executive branch in fashioning and implementing binding policy. Full control over administrative policy has unquestionably been withheld from the Executive.

*4. Private Attorney General Suits.*—Although not often thought of in the same vein, Congress' many decisions to create private attorneys general represent substantial delegations of administrative authority. Without such authorization or delegation, private individuals would lack the constitutional capacity to contest the legality of certain private conduct. The power to determine when to institute suit challenging violation of federal laws, what theories to plead, and what penalties to seek are considered executive prosecutorial powers. Indeed, the Supreme Court in *Buckley v. Valeo,*[89] characterized initiation of a civil suit on behalf of the United States as a quintessential executive function.[90]

Congress' authorization of private individuals to act as surrogate attorneys general has taken many forms. Congress, for instance, has created causes of action to redress injuries[91] that would not have been

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87 49 U.S.C. § 2456(f). Congress may have established the board of review to avoid relinquishing control over the airports altogether. *See generally* 132 Cong. Rec. H11,098 (daily ed. Oct. 15, 1986) (remarks of Sen. Lehman); *id.* (remarks of Rep. Coughlin); *id.* at H11,105 (remarks of Rep. Conte); *id.* at H11,100 (remarks of Rep. Smith); *id.* at H11,106 (remarks of Rep. Hammerschmidt). If the individual members of Congress are viewed as representatives of Congress, which is an inference that can be drawn from the above comments, then the reservation of authority resembles the one-house veto invalidated in *INS v. Chadha*, 462 U.S. 919 (1983).

88 49 U.S.C. § 2456(f)(4)(B). The District Court for the District of Columbia has upheld the board of review's role under the Act. Citizens for Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Auth., 718 F. Supp. 974 (D.D.C. 1989) (appeal pending).

89 424 U.S. 1 (1976).

90 *Id.* at 138. The Supreme Court in *Morrison v. Olson* recently described criminal law enforcement as a purely executive task. 108 S. Ct. at 2619. Many courts have described the criminal prosecutorial power as a core or fundamental executive power. *See, e.g.*, Community for Creative Non-Violence v. Pierce, 786 F.2d 1199, 1201 (D.C. Cir. 1986) (holding that power to decide to investigate and to prosecute "lies at the core of the Executive's duty to see to the faithful execution of the laws"); Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) (stating that "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought"); *cf.* Heckler v. Chaney, 470 U.S. 821, 832 (1985) (stating that certain prosecutorial powers are "the special province of the Executive Branch").

91 In a related vein, Congress has provided for punitive damage actions to restrain unlawful

cognizable in the absence of congressional action.[92] Perhaps the most striking delegation of authority, however, lies in Congress' creation of *qui tam* actions.[93] Through *qui tam* actions, individuals sue on behalf of the sovereign and share any remedy obtained with the government. Unlike other congressionally created causes of action, *qui tam* actions in no way depend upon the existence of individuated injury.[94] Rather, injury to the

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conduct. For statutes authorizing private parties to recover punitive damages in various contexts, see 11 U.S.C. § 362(h) (West Supp. 1990) (violation of stay in bankruptcy proceedings); 12 U.S.C. § 3417(a)(3) (1982) (wilful violation of plaintiff's right to personal privacy by a financial institution); 15 U.S.C. § 1116(d)(11) (West Supp. 1990) (bad-faith allegation of trademark violation leading to a wrongful seizure of goods); 15 U.S.C. §§ 1681n(2), 1691e(b) (1982) (violation of plaintiff's rights under the Consumer Credit Protection Act by a credit reporting agency or a creditor); 42 U.S.C. § 3613 (1982) (discriminatory housing practices); 45 U.S.C. § 441(c)(2) (West Supp. 1990) (discrimination by railroad employers against workplace safety whistleblowers); 50 U.S.C. § 1810(b) (West Supp. 1990) (secret electronic surveillance of an individual).

Similarly, the familiar antitrust treble damage action provides a tool to enforce the federal laws and deter wrongdoing in the future. 15 U.S.C. § 15(a) (1989); *see also* 18 U.S.C. § 1964(c) (1982) (treble damages to person injured by violation of the Racketeer Influenced and Corrupt Organizations Act); 45 U.S.C. § 83 (1989) (treble damages to person unlawfully refused access to certain railroad and telegraph lines); 12 U.S.C. § 2607(d)(2) (1982) (treble recovery of kickbacks and illegal charges for housing settlement service involving a federally related mortgage loan); 15 U.S.C. § 72 (1989) (treble damages to person injured by importation of goods below cost); 15 U.S.C. § 1117(b) (1989) (treble damages for counterfeit trademark); 15 U.S.C. § 1693f (1989) (treble damages for bad faith credit report by financial institution); 46 U.S.C. App. § 1227 (1989) (treble damages to person injured by violation of Merchant Marine Act).

92 For instance, suits under the Freedom of Information Act or under the Fair Housing Act rely only upon congressionally-created injuries and not those recognized at common law. Under the Freedom of Information Act, 5 U.S.C.A. § 552(a) (West Supp. 1989), Congress required federal agencies to provide certain governmental information to private citizens at their request and created a cause of action for citizens to obtain information wrongfully withheld. *Cf.* Public Citizen v. United States Dep't of Justice, 109 S. Ct. 2558, 2563 (1989) (recognizing standing conferred by Congress on private citizens to insist that private committee meetings be open to the public). In the Fair Housing Act (Title VIII of the Civil Rights Act of 1968, 42 U.S.C.A. §§ 3601-31 (West Supp. 1989)), Congress provided that all those "aggrieved" by discriminatory housing practices have standing to sue. 42 U.S.C. §§ 3610(a),(d) (West Supp. 1989). The Supreme Court construed the provision to include those deprived of the benefits of interracial associations, such as white tenants, who presumably could not have sued in the absence of statutory authorization. *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring) (stating that, in absence of legislation, white tenants would not have standing to sue).

93 The name *qui tam* derives from the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur," which means "he who as much for the king as for himself sues in this matter."

94 Defendants in pending *qui tam* actions filed pursuant to the False Claims Act, 31 U.S.C. §§ 3729-33 (West Supp. 1989), have argued that, because *qui tam* plaintiffs have not suffered an injury-in-fact, they lack standing under article III to bring the action. *See, e.g.*, United States *ex rel.* Newsham v. Lockheed Missiles and Space Co., 722 F. Supp. 607 (N.D. Cal. 1989) (rejecting challenge to right of relators to bring *qui tam* action under False Claims Act) (Memorandum opinion and order re motions to dismiss); United States *ex rel.* Stillwell v. Hughes Helcopters, Inc., 714 F. Supp. 1084 (C.D. Cal. 1989) (same). There is no question, however, that the government has suffered an injury sufficient for article III purposes. Indeed, because Congress authorized citizens to sue not only in their own interests but in the name of the United States, the real question raised in

government as a whole is the only prerequisite for maintaining a *qui tam* action.

Delegation to private individuals under *qui tam* actions has at times been extensive.[95] Several courts rejected challenges by defendants asserting that only the executive branch could maintain lawsuits seeking to vindicate the federal government's interests. For instance, in *United States v. Griswold*,[96] the defendant sought to dismiss the *qui tam* action on the ground that the complaint was not filed or approved by any member of the federal government. The court rejected the challenge, reasoning that "although the United States is the plaintiff, [the private relator] is its authorized representative, and not the district attorney, who is not authorized or required to act or interfere in the matter, otherwise than as expressly provided by the statute."[97] Control over the theories of liability, construction of statutes, and penalties sought were vested in private hands.

Moreover, suit by a private individual, at least historically, has robbed the executive branch of some enforcement authority. Until the middle part of this century, a civil *qui tam* action likely precluded the government from subsequently maintaining its own criminal enforcement action against the same defendant.[98] Although the Supreme Court

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the case is one of delegation—whether Congress can delegate the power to private citizens to bring lawsuits on the government's behalf.

95 Soon after ratification of the Constitution, the first Congresses delegated law enforcement authority to private individuals through the medium of *qui tam* actions. For instance, Congress in 1790 provided for a *qui tam* action against ship masters employing seamen without contracts, and against those harboring deserting seamen, Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 133, and in the next years it established the same remedy for violation of Indian laws, postal regulations, liquor laws, the slave trade prohibitions and other congressional enactments. Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137-38 (1790) (enforcing prohibition against unlicensed trading with Indian Tribes); Act of March 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (criminalizing importation of liquor without paying specified duties); Act of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 232, 239 (making criminal failure to abide by certain postal regulations); Act of March 22, 1794, ch. 11, § 2, 1 Stat. 347, 349 (enforcing ban against carrying on slave trade with foreign nations). The postal statute provided, as was typical, that "all pecuniary penalties and forfeitures, incurred under this act, shall be, one half for the use of the person or persons informing and prosecuting for the same, the other half to the use of the United States." Through the *qui tam* actions, private citizens helped enforce the civil and criminal laws of the nation. For a discussion of the role of private citizens in enforcing the criminal laws of the nation, see Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275, 292-303 (1989).

96 26 F. Cas. 42 (D. Or. 1877) (No. 15,266) (*qui tam* action under False Claims Act).

97 *Id.* at 44; *see also* United States *ex rel.* Weiss v. Schwartz, 546 F. Supp. 422, 428 (N.D. Cal. 1982) (stating that, through provision of *qui tam* suits, Congress wished to preclude the executive branch from "thwart[ing] a legitimate investigation and prosecution of fraudulent claims"); United States v. B.F. Goodrich Co., 41 F. Supp. 574, 575 (S.D.N.Y. 1941) (sovereign has no right to interfere with informer's suit); Bush v. United States, 13 F. 625, 629 (C.C.D. Or. 1882) (adverting to private citizen control over *qui tam* action).

98 As the court explained in *United States v. Shapleigh*:

> [w]here provision is made by statute for the punishment of an offense by fine or imprisonment, and also for the recovery of a penalty for the same offense by a civil suit, a trial and judgment of

has since held that an individual can be subject to both a *qui tam* suit and criminal proceedings for the same conduct,[99] it has never intimated that the government could bring its own civil enforcement action after a private *qui tam* action has been completed—principles of res judicata would presumably bar any such effort. Only one civil enforcement action can be brought in the name of the United States, and pendency of a *qui tam* action has precluded the executive branch from settling with the defendants.[100] Congress has thus bypassed the executive branch[101] by vesting some auxiliary law enforcement responsibilities directly in private individuals.[102]

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conviction or acquittal in the criminal proceeding is a bar to the civil suit, and a trial and judgment for the plaintiff or defendant in the civil suit is a bar to the criminal proceeding.

54 F. 126, 134 (8th Cir. 1893) (relying upon Coffey v. United States, 116 U.S. 436 (1886) (holding that acquittal in criminal prosecution for tax evasion barred a subsequent civil forfeiture action by the government for tax evasion based on the same facts); United States v. McKee, 26 F. Cas. 1116, 1117 (C.C.E.D. Mo. 1877) (No. 15,688) (holding that conviction in a criminal prosecution for tax evasion barred a subsequent civil penalty action brought by the government under the False Claims Act)). The state court in *Commonwealth v. Churchill*, 5 Mass. 174 (1809), followed the conventional path in holding that a *qui tam* action for usury precluded a subsequent state criminal prosecution for the same offense.

99 United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 549-52 (1943). Even then, the Court noted that institution of a *qui tam* action, as a practical matter, could impede the government's ability to prosecute a case. *Id.* at 560-61 (Jackson, J., dissenting on other grounds). Moreover, the Supreme Court's recent decision in *United States v. Halper*, 109 S. Ct. 1892, 1903 n.11 (1989), at least obliquely suggests that a successful *qui tam* action which exacts a punitive recovery from a defendant may in fact preclude a future criminal action under the double jeopardy clause.

100 United States *ex rel.* Coates v. St. Louis Clay Products Co., 68 F. Supp. 902, 904-05 (E.D. Mo. 1946) (executive branch does not enjoy plenary right to settle *qui tam* suit); *cf.* B.F. Goodrich Co., 41 F. Supp. at 575 (only one action can be brought in the name of the United States). Control over whether to appeal the action similarly rests in the hands of the private party.

101 In light of that possible intrusion, Congress in recent years has somewhat narrowed the broad delegations to private individuals in *qui tam* actions. *See, e.g.*, Act of Dec. 23, 1943, Pub. L. No. 78-213, 57 Stat. 608 (1943) (narrowing terms under which individuals could maintain *qui tam* action under False Claims Act by requiring plaintiff to notify United States of claim, by authorizing suit only if the government did not take over suit within 60 days, and barring suits based on information already known to the government); I.R.C. § 3740, 53 Stat. 460 (1939) (repealed) (all suits to recover taxes owed federal government, including *qui tam* actions, I.R.C. § 3745(c), 53 Stat. 460 (1939), must be approved by the Commissioner of Internal Revenue and the Attorney General). In 1986, Congress again amended the *qui tam* provisions in the False Claims Act, Pub. L. No. 99-562, 100 Stat. 3154, 3157 (codified at 31 U.S.C. § 3739(c) (West Supp. 1989)), to provide that if the government elects to take over a *qui tam* suit, the plaintiff may continue as a party to the suit but that the court may restrict his or her participation upon motion of the government, 31 U.S.C. § 3730(c)(2)(C) (West Supp. 1989), and that, upon a showing of good cause, the government may intervene at any time after the sixty-day notice period. 31 U.S.C. § 3730(c)(3) (West Supp. 1989).

In addition to the False Claims Act, there are several *qui tam* provisions still in existence today. *See* 25 U.S.C. § 201 (1982) (enforcing Indian protection laws); 35 U.S.C. § 292 (1982) (enforcement of patent laws).

102 Because I have focused only on congressional delegations outside the federal government, I have not addressed the enforcement functions and interstitial lawmaking carried out by courts. *See, e.g.*, Dice v. Akron, Canton & Youngstown Ry. Co., 342 U.S. 359 (1952). Congressional delegations to the judiciary, to a certain extent, can be justified by the constitutional design: the judiciary must

## III. RECONCILING PAST CONGRESSIONAL DELEGATIONS OF POWER OUTSIDE THE FEDERAL GOVERNMENT WITH THE ARTICLE II REQUIREMENT OF EXECUTIVE CONTROL AND THE ARTICLE I LIMITATIONS ON LEGISLATIVE ACTION

Prior congressional delegations of authority outside the federal government coexist with our current understanding of the separation of powers doctrine only uneasily, at best. On the one hand, Congress has a legitimate interest under article I in determining the identity of its delegate, particularly because the delegate may implement the law in a more efficient—or more politic—manner than agents within the executive branch. The President, on the other hand, enjoys a countervailing interest in superintending the exercise of all administrative authority delegated by Congress. Individuals share that interest to the extent that they are thereby protected from policy set by politically unaccountable actors.

In this Section, I explore several possible ways to reconcile the kinds of delegations discussed above with the constitutional structure of separated powers. A formalist explanation for the delegations is not possible. The exercise of administrative authority outside the executive branch cannot be accommodated with the Constitution's vesting of all executive power in one President, because the President can neither appoint nor remove such delegates.

A functionalist approach is more promising.[103] Much of the delegated authority, even though exercised outside the federal government, is subject to a complex system of checks and balances. The executive branch may retain some supervisory control, and if not, checks external to the executive branch—such as the political sensibilities of state leaders and pressures of the state electorate—may circumscribe exercise of that authority. Not all delegations, however, can be explained on this basis and, in any event, the external checks explanation alters contemporary separation of powers doctrine almost beyond recognition.

Alternatively, the separation of powers doctrine might be seen as embodying one set of constitutional values that must be balanced against others, such as the value of political participation underlying our federal structure. Delegations outside the federal government may encourage groups and individuals targeted by federal regulation to help shape the content of regulations affecting them. Nonetheless, even though many delegations can be explained on the above terms, I conclude that the at-

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interpret, apply, and sometimes fashion the law in discharging its constitutional responsibility to decide cases and controversies.

103 For an analysis of the tensions between formalist and functionalist approaches, see Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 209-13 (1990).

tempted reconciliation fails to comport with contemporary separation of powers doctrine.

### *A. Presence of Checks and Balances*

The Supreme Court's perspective on separation of powers has seemingly evolved toward a functionalist approach. Its recent decisions in *Morrison*[104] and in *Mistretta*[105] reflect an overriding concern for the pragmatic consequences flowing from congressional efforts to shield administrative authority from direct Presidential control. In both cases, the Court focused chiefly on whether the congressional scheme—the office of independent counsel in *Morrison* and the Sentencing Commission in *Mistretta*—posed an immediate threat to the balance of powers. In upholding the congressional enactments, the Court eschewed more formalist concerns such as policing the boundaries among the three branches or preserving the unitary Presidency.

Congressional delegations outside the federal government perhaps can be reconciled with our system of separated powers under a similar functionalist analysis. As long as sufficient checks—whether through executive branch supervision or external pressures—cabin the discretion of delegates outside the federal government, the system of separated powers can be preserved. In other words, Congress may circumvent the Executive's appointment and removal powers if its delegates' authority is sufficiently constrained. The presence of such checks prevents Congress from controlling the delegate,[106] thereby serving as a brake on Congress' willingness to delegate in the first place. The checks also may ensure that the delegated authority is exercised in a public-regarding fashion—and "public-regardedness" may be the closest proxy available for public accountability.

*1. Executive Branch Oversight.*—Congressional delegations of executive-type authority outside the federal government might be accommodated with article II if the Executive retains at least some practical control over the delegated authority. Even if the individual or entity exercising authority is outside the federal government, maintaining some

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104 Morrison v. Olson, 108 S. Ct. 2597 (1988).

105 Mistretta v. United States, 109 S. Ct. 647 (1989).

106 Congress, for instance, cannot easily interfere with the authority delegated to the states. Executive branch oversight or external checks, *see infra* notes 107-22 & 135-46 and accompanying text, preclude Congress from using delegates outside the federal government to create congressional agents. Congress therefore controls implementation of the delegated authority only to the extent it influences any other delegation—through, for example, committee hearings and passing new laws. The only exception may lie in Congress' recent delegation to certain individual members of Congress to serve on the board of review supervising operation of Dulles and National Airports. *See supra* notes 84-88 and accompanying text. The possibility for continued congressional influence is rather evident. Because the absence of congressional control under *Chadha* and *Bowsher* must at least be a prerequisite for a valid delegation, Congress' delegation in that context is problematic indeed.

executive branch control guarantees a measure both of unity and public accountability for the exercise of power. The delegate is checked by actual or potential executive branch supervision. Some delegations outside the federal government are consistent with this characterization.

For instance, congressional delegations to states under the Social Security and Clean Air Acts reflect a cooperative partnership which is unquestionably dominated by the Executive. State plans must receive executive branch approval, and states must implement congressional policy within a framework set by executive branch regulation. Although states execute federal law under regulatory programs, such exercise does not pose an appreciable threat to overall executive control. Splitting the power to frame broad policy objectives from the power to implement previously set objectives at the local level does not necessarily rob the Executive of its constitutionally prescribed role, and the Executive retains the power to reject state plans.

Similarly, the executive branch maintains supervisory authority in other contexts as well. As an example, congressional delegation to private groups to determine acreage quotas cannot be considered a threat to overall executive branch control. The Secretary of Agriculture determines the allotment per state and only then may the private delegates determine how that allotment is filled. When the executive branch retains effective veto power, as with the Secretary of the Interior's power to veto any Indian Tribe liquor regulation,[107] the potential for encroachment into executive prerogatives is slim. Moreover, in the absence of veto power, the Executive may still formally control the delegated authority by retaining the effective power to remove the private delegate, as HHS can by severing its relationship with several private health care groups.[108]

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107 18 U.S.C. § 1161 (1989).

108 The 1986 Budget Reconciliation Act, Pub. L. No. 99-509, required hospitals participating in Medicare or Medicaid to establish written procedures for identifying potential organ donors and notifying an organ procurement agency of the existence of a potential organ donor. Congress also required those hospitals performing organ transplants to abide by the rules and requirements of a private organization to be selected by HHS. In essence, the organization selected by HHS, the United Network for Organ Sharing (UNOS), became the entity regulating all hospitals performing transplants that wished to participate in the Medicaid or Medicare programs. *See* Blumstein, *Government's Role in Organ Transplantation Policy*, 14 J. HEALTH, POL., POL'Y & LAW 15-19 (1989). HHS, however, may select a different private delegate to discharge those functions currently undertaken by UNOS.

In a similar vein, Congress has vested private health organizations with the power to regulate their peers, subject—at least generally—to HHS control. For instance, Congress directed the Secretary of Health and Human Services to designate private Professional Standards Review Organizations (PSRO), 42 U.S.C. § 1320c, subject to veto power by physicians, who are to review whether prescribed services or items were medically necessary. *See* Association of Am. Physicians and Surgeons v. Weinberger, 395 F. Supp. 125 (N.D. Ill.), *aff'd without opinion*, 423 U.S. 975 (1975). HHS, at least theoretically, can designate a new private organization—now termed a Peer Review Organization—if the need arises.

Contemporary separation of powers cases in the Supreme Court lend some credence to the executive control explanation. In *Nixon v. Administrator of General Services*,[109] for example, the Court considered whether Congress unduly impinged upon the executive branch by asserting some control over Presidential papers under the Presidential Recordings and Materials Preservation Act.[110] Congress directed executive branch archivists to screen Presidential papers and, based upon criteria set by Congress, determine which papers should be released to the public. In assessing former President Nixon's challenge, the Court stated that

> in determining the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which [the contested law] prevents the Executive Branch from accomplishing its constitutionally assigned functions.[111]

Ostensibly because the Act vested control of the screening process in an officer of the executive branch, the Administrator of General Services, the Court concluded that the Act was consistent with separation of powers principles.[112]

More recently, the Court in *Morrison*[113] upheld, over the executive branch's vigorous opposition, Congress' delegation of prosecutorial powers to an independent counsel. Under the Ethics in Government Act of 1978,[114] the Attorney General may apply for appointment of an independent counsel to investigate and prosecute high-ranking government officials.[115] The Act directs the Attorney General, upon receipt of credible information that such a person has engaged in criminal activity, to conduct a preliminary investigation within ninety days. To secure appointment of an independent counsel after the preliminary investigation, the Attorney General must apply to a special division of the United States Court of Appeals for the District of Columbia.[116] The special division must then appoint the independent counsel, define the counsel's jurisdiction, and loosely oversee the investigation.[117] Unique among federal prosecutors, the independent counsel is shielded from the President's (or Attorney General's) plenary removal authority.

In light of the special division's power of appointment and removal

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109 433 U.S. 425 (1977).

110 44 U.S.C. § 2111 (1982).

111 *Nixon*, 433 U.S. at 443. The Court continued that "[o]nly where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."

112 *Id.* at 443-46. The Court also intimated that, even if some disruption existed—because of the threat to the loss of confidentiality of presidential communications—the congressional objective of providing public access would have outweighed that limited intrusion into the executive branch. *Id.* at 451.

113 108 S. Ct. 2597 (1988).

114 28 U.S.C. §§ 591-98 (1982 & Supp. IV 1986).

115 *Id.* §§ 591(b)-(c).

116 *Id.* § 392(c).

117 *Id.* §§ 593(b)-(c), 594(e).

and the Attorney General's limited authority to remove the independent counsel, the Court recognized that "[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General . . . exercises over the investigation and prosecution of a certain class of alleged criminal activity."[118] Nonetheless, the Court concluded that the Executive retains "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."[119] Through the power to decide whether to apply for an independent counsel as well as through the power to remove an independent counsel for cause, the Attorney General exercised constitutionally adequate control over the delegated authority.[120]

Taken together, *Nixon* and *Morrison* suggest that, where Congress permits the co-ordinate branch to retain some level of control, no substantial separation of powers issue is raised. Thus, delegations of administrative authority outside the federal government, if accompanied by sufficient safeguards protecting executive prerogatives, may not present significant separation of powers difficulties. Indeed, the Supreme Court on occasion has appeared to adopt this view. In *Sunshine Anthracite Coal v. Adkins*,[121] the Court held that the advisory role private producers played in recommending coal prices did not constitute an unlawful delegation of executive power to private individuals because the private members "function[ed] subordinately to the [public] Commission. It, not the [private producers], determines the prices."[122]

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118 *Morrison*, 108 S. Ct. at 2621.

119 *Morrison*, 108 S. Ct. at 2621-22. The Court in *Mistretta* also stressed that the new sentencing scheme permitted the President some control over shaping the content of the sentencing guidelines by virtue of his appointment authority and his power to remove members of the Commission for cause.

120 Similarly, in *United States v. Raddatz*, 447 U.S. 667 (1980), the Court considered whether to uphold the constitutionality of the 1976 Magistrates Act, 28 U.S.C. § 636(b)(1)(B), which vested in non-article III magistrates the power to preside over suppression motions subject to de novo determination. In concluding that the Act was consistent with the independence of the article III judiciary, the Court stressed that magistrates were subject to discipline by article III judges and that their rulings, if challenged, permitted de novo review. Thus, the judiciary in effect held the keys to its own independence. *See Raddatz*, 447 U.S. at 685 (Blackmun, J., concurring) (noting that the "only conceivable danger of a 'threat' to the 'independence' of the [judicial determination] comes from within, rather than without, the judicial department").

121 310 U.S. 381 (1940).

122 *Id.* at 399; *see also* Cospito v. Heckler, 742 F.2d at 86-87 (relying on same reasoning); Chiglades Farm, Ltd. v. Butz, 485 F.2d 1125, 1134 (5th Cir. 1973) (relying on similar reasoning to uphold delegation to producer groups to divide market for celery in Florida), *cert. denied*, 417 U.S. 968 (1974). This approach parallels current application of the nondelegation doctrine. Just as the Supreme Court asks in delegation cases only whether Congress has specified standards concrete enough to guide the delegation, the Court might ask whether the executive branch is left with sufficient controls to permit some type of overall supervision. Realistically, however, private groups exercise substantial administrative authority, even if formal control rests with the Executive. For instance, the Secretary presumably does not look afresh at each expenditure or strategy approved by the private Beef Promotion Board under the Beef Promotion and Research Act. *Frame*, 885 F.2d at 1131-33.

The executive control explanation, however, is unsatisfactory on several fronts. First, it fails to explain a considerable number of congressional delegations which have in fact vested administrative authority outside the Executive's control. For instance, the Executive historically has been precluded from exercising full control over civil and even criminal law enforcement.[123] Private relators (or state officials) may ineffectively pursue litigation in the name of the United States,[124] and the executive branch is barred from relitigating the case. Private relators (or state officials) may even skew federal litigation priorities by arguing jurisdictional or evidentiary points that cut against federal interests elsewhere. And, suits filed by *qui tam* plaintiffs historically have prevented the executive branch from settling with defendants in order to pursue a strategic advantage in related civil or criminal litigation.[125] Indeed, the executive branch on occasion has challenged aspects of congressional delegations to private attorneys general.[126]

In addition to delegation of enforcement authority, Congress' delegations of regulatory authority to individuals and groups are also difficult to reconcile with article II control. For example, Congress' delegations to various producer groups allowing them to determine whether marketing orders or research programs are needed unquestionably constrain executive authority. Producers, as a whole, exercise a veto power over executive branch policy and, as a pragmatic matter, substantially influence formulation of that policy.[127] Delegation to the private members on

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123 Private attorney general actions also are nondiscretionary in the sense that, if Congress provided federal litigators with a bounty for each successful case brought, then the federal enforcement scheme might proceed similarly to that in the private sector. In other words, private attorneys general do not generally exercise the prosecutorial function of sifting through valid claims to determine which ones should be brought. Moreover, under the current version of the False Claims Act, 31 U.S.C.A. §§ 3729-3731 (West Supp. 1989), the Department of Justice has at least 60 days after a *qui tam* action is filed in which to investigate the plaintiff's allegations and decide whether to take over the suit. Thus, as a functional matter, the executive branch today has substantial control over *qui tam* suits under the False Claims Act, the most important *qui tam* statute still in existence.

124 *Cf.* Minotti v. Lensick, 895 F.2d 100 (2d Cir. 1990) (ruling that Attorney General need not be consulted prior to dismissing *qui tam* claim because of private relator's failure to comply with discovery orders).

125 Coates v. St. Louis Clay Products, 68 F. Supp. 902, 904-05 (E.D. Mich. 1946); *see also* Sherr v. Anaconda Wire & Cable Co., 149 F.2d 680 (2d Cir. 1945) (noting that at common law Crown could not by settlement bar *qui tam* action). For a constitutional defense of *qui tam* statutes, see Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341 (1989).

126 Brief of the United States, United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); *see also* France, *The Private War on Pentagon Fraud*, 76 A.B.A. J. 46, 48-49 (1990) (Chief of Department of Justice Civil Fraud Unit expresses reservations about operation of *qui tam* statute).

127 In the New Deal referenda cases, the Supreme Court implicitly held that no executive power was delegated to the private parties. Rather, "Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market 'unless two-thirds of the growers voting favor it.' " Currin v. Wallace, 306 U.S. 1, 15 (1939); *see also Frame*, 885 F.2d at 1127-28 (following reasoning in *Currin*); United States v. Rock Royal Cooperative, Inc., 307 U.S. 533, 577-78 (1939) (same). The power to decide when or whether a congressional program should be implemented, however, appears "executive" or administrative under any commonsense understanding of that

the FOMC potentially removes power from the Executive, since the block of five private members could, on particularly divisive issues, exercise decisive authority in changing certain financial policies. Congressional incorporation of rules formulated outside the federal government also prevents the executive branch from supervising the exercise of such delegated authority,[128] and even delegation of technical authority,[129] such as to the American Railway Association to establish a mandatory drawbar height,[130] is unchecked by executive oversight. Moreover, much of the considerable authority delegated to states to implement joint federal-state programs lies outside the Executive's practical control.[131]

Second, it is unclear whether, even under a functionalist approach to the separation of powers, executive branch supervision adequately substitutes for the President's removal power. To be sure, the Court in *Morrison* permitted Congress to vest some appointment authority over inferior officers in the courts, but the Court has never held that executive branch officials can be completely shielded from the President's removal authority. In both *Morrison* and *Mistretta*, the Court stressed that the President retained such control, even if circumscribed by a "for cause" requirement. Perhaps such control is not necessary if the delegate is outside the federal government, but then courts must undertake the delicate task of assessing whether "sufficient" substitute executive supervision in fact exists. As with functionalist approaches in general, courts have great leeway in making such determinations.[132]

Third, even if a functionalist approach is appropriate, executive control over authority delegated outside the federal government may not adequately satisfy the public interest in accountable, reflective governance. Because Congress, as opposed to the Executive, authorizes the delegation, the Executive might permit tradeoffs it would never allow if it were

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term—authority delegated which requires implementation. Indeed, it was Congress' effort to delegate comparable power to one of its own Houses that was blocked in *Chadha*. The executive nature of the task would perhaps be clearer if the power to approve were delegated instead to the head of a local 4-H Club, but even if diffusely exercised, the task remains the same. *See also* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 407 (1928) (characterizing President's authority to determine whether or not tariff should go into effect as executive).

128 *See supra* note 59.

129 The Supreme Court in *Schechter* implicitly suggested that regulations of "matters of a more or less technical nature" could be delegated to private parties. 295 U.S. at 537. The line between technical and non-technical authority, however, is quite difficult to draw, and Congress almost inevitably leaves discretion to its delegate in implementing congressional directives.

130 Saint Louis, Iron Mountain & Southern Ry. Co. v. Taylor, 210 U.S. 281 (1908).

131 For instance, the Supreme Court in *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975), stressed the federal government's limited role in superintending states' formulation and enforcement of emission standards. *See also* National Steel Corp. v. Gorsuch, 700 F.2d 314, 322 (8th Cir. 1983) ("The states are given wide discretion in formulating and revising their individual implementation plans . . . . The role of the EPA (in this scheme) is purely a secondary one.").

132 For the general debate, see Carter, *From* Sick Chicken *to* Synar: *The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719.

directly responsible for the subsidiary policy decision.[133] When the Executive decides to contract out, it is likely to exercise more vigorous oversight than it does when Congress in essence makes the contracting-out decision. Moreover, the Executive might well escape responsibility in the public eye for the private exercise of that authority, even if it is subject to executive oversight. Thus, the executive control thesis by itself can neither explain all of the delegations that have occurred, nor fully explain why, even if executive control is maintained, congressional delegations are consistent with article II's protection of responsible governance.[134]

*2. The Existence of External Checks on the Delegate.*—Another way to reconcile the conflicting constitutional values may be to suggest that, even if Congress has delegated administrative authority outside the executive branch's immediate supervision, the delegate's exercise of authority may nonetheless be checked by some external constraint. This explanation focuses on possible substitutes for the public accountability that executive branch control ensures. External checks could lie in the self-interest of a different sovereign governmental entity, the self-interest of a particular industry, judicial review, or market forces. Although the benefits that flow from executive branch control may be lost, external checks conceivably serve as a surrogate for article II supervision, promoting the public-regardedness of the policy formulated by delegates outside the federal government.[135] This strand of the checks and balances theory has considerable explanatory power, for most delegates

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133 The general problem of subdelegation is addressed in Aranow, Gelhorn & Robinson, *supra* note 35. If the executive branch itself makes the decision to contract out, then the ultimate policy selected is more directly traceable to the Executive.

Some have suggested that the Clean Air Act permits the EPA to delegate to the states the tough choices Congress and the EPA wished to avoid. *See* R. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 227-230 (1983) (making the suggestion by implication). Of course, delegations to administrative agencies have been criticized for similar reasons. Aranow, Gelhorn & Robinson, *supra* note 35.

134 In some situations, the executive branch may welcome delegations outside the federal government even if it retains no direct supervisory control over the delegated authority. But for Congress' ability to make such delegations, Congress may have declined to regulate a field entirely, and left the federal government without any regulatory role in that area. *See supra* note 13. Although the executive branch may understandably welcome such delegations, the absence of executive branch checks fails to satisfy the individual interest in politically accountable governance. Policy formulated outside the government has not been leavened by the constitutional checks on governmental action, irrespective whether the executive branch has gained power or not. To be sure, prior to federal regulation individuals may have been subject to similar policy at the behest of states or private producer groups. But when Congress places the coercive power of the federal government behind private action, individuals subject to that coercion arguably enjoy the right to have that policy formulated in the constitutionally prescribed manner—by Congress or by the politically accountable Executive.

135 The presence of external checks also precludes Congress' ability to unduly influence its delegate outside the federal government. If the delegate's exercise of authority is checked by judicial review, for example, Congress cannot easily control the delegate. Similarly, if the delegate must obtain the approval of producer organizations, less room for congressional influence exists.

outside the federal government—though unaccountable in the usual sense for their acts—are circumscribed by some external constraint.

Congress' decision to incorporate state laws presents a paradigm. State legislators possess an independent interest in fashioning public-regarding laws, and Congress incorporated those laws in light of that independent interest. Although the executive branch exercises little practical supervision, another constituency—the state electorate—checks the conduct of those actors outside the federal government; that other constituency serves, in essence, as a replacement for the executive branch, safeguarding the content of the ultimate policy implemented. States and Indian Tribes enjoy a measure of sovereignty, and delegations to both are checked by their self-interest in regulating themselves effectively.[136] Although the federal interest in regulation may at times diverge from that of the states or Indian Tribes, those sovereign entities are at least accountable to their own constituencies.

Many delegations to private groups are similarly cabined by external constraints, even if not of a political nature. Private groups may be checked by the need to satisfy their own constituencies. Congress' decision to adopt miners' custom as federal law reflects Congress' belief that the miners themselves would adequately monitor the development of mining law.[137] Private members of the FOMC likewise may conduct their public responsibilities knowing that they are directly accountable to the boards of the private Federal Reserve Banks for their decisions. In other words, there may be an identity of interest between the private banks and the public interest; each presumably desires a healthy, stable economy. Private interest may serve as a proxy for the "public" interest and thus circumscribe many of the congressional delegations outside the federal government.[138]

Indeed, the pluralist vision of competing interest groups helps explain some of these delegations. For instance, Congress directed that the National War Labor Board[139] be equally divided among representatives

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136 Indeed, the Supreme Court in *Mazurie* noted that the "independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority." 419 U.S. 544, 557 (1975).

137 To the extent that the privately developed norms or standards are wealth-maximizing, or at least the product of deliberation by affected groups, congressional incorporation of those norms may promote the general welfare. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEG. STUD. 67, 99 (1987).

138 When Congress delegates power to private groups whose policy objectives are widely known, it may in fact remain accountable for that delegation, even if the private group is not. Consider the hypothetical delegation to the UMW to fashion workplace safety rules. Although the UMW would not be politically accountable for the rules it formulates, Congress generally would be politically accountable because it would have made the important policy choice in choosing the UMW as its delegate.

139 War Labor Disputes Act, 57 Stat. 163 (1943); *see* H. KARIEL, THE DECLINE OF AMERICAN PLURALISM 74-75 (1961); Richards, *Tripartitism and Regional War Labor Boards*, 14 J. POL. 72 (1952).

of industry, labor, and the public. Similarly, the National Railroad Adjustment Board was split evenly among representatives of rail carriers and their employees.[140] Congress trusted that the specified interest groups would adequately represent their own members, and that the ultimate policy adopted would thus reflect the public interest.[141]

The market may also check the actions of private delegates when undertaking proprietary functions, as long as competition exists.[142] Private shareholders or members on the board of directors of public corporations like CONRAIL or AMTRAK know that irresponsible decisions in operating their corporations may undermine their corporations' ability to compete in the marketplace. Private members on the FOMC similarly realize that the market constrains their conduct. Market discipline may ensure a measure of public-regardedness.[143] Indeed, external checks in some contexts may cabin the conduct of delegates outside the federal government much more completely than the often remote prospect of executive branch supervision.[144]

Judicial review may further constrain state and private delegates.

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140 48 Stat. 1189 (1934).

141 States as well have established administrative agencies along these pluralist lines. *See, e.g.*, United Farm Workers of Am. v. Arizona Agric. Employment Relations Bd., 727 F.2d 1475 (9th Cir. 1984) (en banc) (sustaining membership qualifications on Arizona agency).

142 Delegation can be seen as an effort to restore some initiative to the private market even if congressional controls still exist. Professor Gillette has suggested that the underlying purpose of the delegation doctrine is to ensure that the entity exercising power is best equipped to make cost-benefit analyses on that specific issue. Gillette, *Who Puts the Public in the Public Good?: A Comment on Cass*, 71 MARQ. L. REV. 534, 537-38 (1988).

143 Delegation of the eminent domain power to private individuals provides another example. The market serves as a check on those private individuals whom Congress has entrusted with such authority. *See, e.g.*, Missouri v. Union Elec. Light & Power Co., 42 F.2d 692, 697-98 (C.D. Mo. 1930) (Congress granted utility company eminent domain power under Water Power Act); Thatcher v. Tennessee Gas Transmission Co., 180 F.2d 644 (5th Cir. 1950) (same under National Gas Act). Assuming that the assessment scheme is functioning appropriately, the market constrains condemnation decisions of private delegates, with the exception perhaps of land with idiosyncratic value, such as parkland and historical buildings. *See Union Elec. Light & Power Co.*, 42 F.2d at 694 (alleging that private utility company's construction of a dam would flood the county seat, including public buildings such as the courthouse).

An interesting analogy can be drawn to state action cases involving state government support of monopolies. The Court has intimated that government creation of private monopolies may lead to a finding that private monopolies are an arm of the state, presumably because the state is *removing* the market check upon a private corporation to allow it to exercise a form of government-type power. *Cf.* Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956). But when the government merely supports a *natural* monopoly, the Court has held that state action is not necessarily present. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 n.8 (1975). The reasoning in *Jackson*, however, has been widely condemned. *See* Tushnet, *supra* note 15, at 394.

144 Legal constraints are often not as effective as private custom in ordering private behavior. *See, e.g.*, R. POSNER, REGULATION OF ADVERTISING BY THE FTC 4-6 (1973); Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986); Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. ORG. 1 (1985). *But cf.* Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277, 1355-77 (1984) (criticizing reliance on market to check corporate mismanagement effectively).

Although review in the administrative context is usually confined to a substantial evidence or arbitrary and capricious standard,[145] it may nonetheless serve as a check on self-dealing. Moreover, if the delegate's exercise of authority constitutes state action, the full range of constitutional protections apply. Judicial review is available for state implementation decisions under the Clean Air Act, and for the acreage allotments made by private parties under the Agricultural Adjustment Act.[146] Thus, even if effective constraints cannot be imposed by the executive branch, the discretion of delegates outside the federal government may be effectively constrained by other forces, whether by private constituency, the market, or judicial review.

Some delegations, however, are cabined neither by executive branch oversight nor by any external constraint. Delegations to private attorneys general, for instance, while perhaps constrained loosely by financial feasibility, are immune from most external supervision—judicial oversight does not extend to their motives or strategy. Similarly, delegations to the JCAH are not constrained by the market or a private constituency.[147]

Although other delegations might be constrained by external checks, public choice insights suggest that the efficacy of those checks is open to serious question. Some delegations to states might enhance responsiveness but others might not,[148] and some delegations to private parties—while ostensibly designed to attain efficiency—might actually create greater monopoly rents.[149] Delegation to milk handlers presents a

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145 *See, e.g.*, McLamb v. Pope, 657 F.2d 77 (4th Cir. 1981) (reviewing acreage allotment decision under substantial evidence test); *see also* Meusberger v. Palmer, 900 F.2d 1280, 1283 (8th Cir. 1990) (arbitrary and capricious standard applied to review of state implementation decision under Medicaid); Amisub (PSL), Inc. v. Colorado Dep't of Social Serv., 879 F.2d 789, 799 (10th Cir. 1989) (same).

146 Judicial review is not available, however, for a wide panoply of private actions, including the FOMC's market decisions, the milk producers' referenda, and the JCAH accreditation decision. By its own terms, the APA applies only to federal agencies. 5 U.S.C. § 551(1). In any event, judicial review under the arbitrary and capricious standard or substantial evidence test is a modest check at best.

147 The JCAH is currently composed of members of the American College of Physicians, the American College of Surgeons, the American Dental Association, the American Hospital Association, and the American Medical Association. A participatory explanation is somewhat more plausible. *See generally* text accompanying notes 153-71, *infra*.

148 For example, some have suggested that Congress' delegation to the states under the Clean Air Act has not worked to promote public-regardedness. *See* R. MELNICK, *supra* note 133; Schoenbrod, *Separation of Powers*, *supra* note 35, at 367-70.

Indeed, Madison defended the federal structure in part on the ground that policy formulated on so broad a scale would tend to be more public regarding. THE FEDERALIST No. 10 (J. Madison) (J. Cooke ed. 1964). He expressed concern that smaller geographic units, due to factional pressures, would not be able to formulate sound policy.

149 *See, e.g.*, American Soc'y of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 558-64 (1982) (national standards committee influenced by prospect of personal gain in setting standards); Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332 (9th Cir. 1990) (members of the

conspicuous example.[150] Because only Congress (subject to Presidential veto and congressional override) has determined that the delegation is consistent with its responsibility to protect the public,[151] the ultimate content and public regardedness of the delegated authority are open to doubt. External checks, therefore, are a problematic substitute for executive branch accountability.

Perhaps more importantly, the explanation based on external checks simply cannot be reconciled with the system of separated powers as presently understood. If the Constitution is to retain any meaning as a blueprint for government, then some accommodation must be made between the current practice and article II.[152] Although the external check explanation provides us with an understanding of why delegations outside the federal government may be more public regarding than otherwise feared, it attempts to ensure public-regarding policy outside of the constitutionally prescribed system. If Congress can replace executive supervision under article II with supervision outside the federal government, there may be little left of unified law enforcement. Justifying departures from the constitutional structure on the basis of ad hoc bal-

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producer committee appointed by Secretary allegedly set maturity standards for plums and nectarines so as to corner market for themselves). The very concept of delegating authority to enable private groups to regulate themselves raises a paradox. The Court in *Schechter* rejected the government's contention that the producers should be trusted to prescribe regulations for the whole industry: "But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries?" 295 U.S. at 537. At least with respect to the banking industry, President Roosevelt reportedly had scoffed at the idea that bankers should be delegated the authority to monitor themselves: "Imagine what national policy would be like if, instead of requiring such group to conform to the public interest, they were free to bargain about what they would or would not consent to accept. Outrageous." W. LEUCHTENBURG, FDR AND THE NEW DEAL 90 (1963).

Professor Bruff, however, suggests that delegations to private parties may actually promote fairness—"[b]ecause of market-based incentives, decisions of private groups may be acceptable as proxies for more widely shared interests." Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 461 (1989). Professor Bruff continues that the private parties may share interests with the general public, as in the self-regulation of particular industries. Although delegating authority to private parties may indeed be attractive from an efficiency perspective, market-based incentives may or may not serve as an adequate watchdog for public-regarding policy.

150 *See* Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 49-51 (1984); Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 330-34 (1988).

151 Congressional delegations outside the executive branch may leave the President little role other than wielding a veto in countering or checking legislative discretion. Congress may therefore have correspondingly more incentive to make such delegations.

152 The Supreme Court has recently emphasized that Congress cannot exercise its article I powers to subsume other structural requirements in the Constitution, such as: the appointments clause (*see Buckley*, 424 U.S. 1 (1977); *Public Citizen*, 109 S. Ct. at 2573, 2582-84 (Kennedy, J., concurring)); the compensation clause (*see* United States v. Will, 449 U.S. 200, 226 (1980)); and the presentment clause (*see Chadha*, 462 U.S. at 919).

ancing may, in the long run, erode the enduring vitality of our constitutional system.

### *B. Delegations Promoting Participation in Self-Government*

Another powerful explanation focuses on the ability of private groups and individuals to participate in governance.[153] In almost all delegation contexts, Congress has granted private individuals and groups, as well as state entities, a considerable measure of authority to help fashion the content of federal regulations constraining their conduct. Despite the fact that, as discussed above, such exercises of authority are unchecked in a constitutional sense, they strike a resonant chord in our republican tradition, encouraging local participation in government.[154] Participatory values might thus override the goal of a unitary executive.

Almost by definition, delegations to state governments and Indian Tribes embody federalism principles—Congress has agreed to allow states and Indian Tribes a measure of autonomy. As discussed previously,[155] the constitutional structure suggests that the interest in federalism can trump the interest in a unitary executive. Rather than decide what is best for the Indian Tribes and states concerning matters of local interest, Congress has delegated that responsibility to the Indian Tribes and states themselves. The massive delegations of authority to states to determine Medicaid eligibility, air quality, Food Stamp requirements, and the like conform to that pattern. Delegations to states, municipal governments, and Indian Tribes allow citizens to have a more direct voice in shaping federal policies that touch their lives.[156]

Delegations to private parties for the most part follow that same pattern. Congress generally allows groups of producers to determine the standards or regulations to govern their conduct. Indeed, in directing OSHA to adopt national consensus standards, Congress specified that only those standards established by some representative process should be adopted.[157] Congress also provided that, for producers to have a say in setting research and promotion programs for their industries, they

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153 Professor Jaffee long ago made the same argument with respect to lawmaking by private groups pursuant to delegated authority from the state. Jaffee, *supra* note 10, at 212; *see also* Michelman, *Political Markets and Community Self-Determination: Competing Judicial Methods of Local Government Legitimacy*, 53 IND. L.J. 145 (1977-78) (analyzing state delegation cases).

154 For a recent paean to participation, see B. BARBER, STRONG DEMOCRACY (1984).

155 *See supra* notes 60-63 and accompanying text.

156 *See* Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after* Garcia, 1985 SUP. CT. REV. 341, 395-405 (suggesting that value of participation underlies federal structure of Constitution).

157 29 U.S.C. § 652(9) (1988) ("the term 'national consensus standard' means any occupational safety and health standard or modification thereof which . . . has been adopted . . . under procedures whereby it can be determined by the Secretary that persons interested or affected by the scope or provisions of the standard have reached substantial agreement on its adoption [and] was formulated in a manner which afforded an opportunity for diverse views to be considered . . . .").

must participate in a representative process.[158] To the extent that a private group fashions rules binding itself,[159] we are seemingly not as concerned about the concomitant loss in executive branch control.[160]

Delegations to individuals to act as surrogate attorneys general serve an analogous function. At common law, individuals played a much more active role both in civil and criminal law enforcement than is realized today.[161] Through *qui tam* actions and direct criminal prosecutions, private individuals participated directly in enforcing statutory as well as common law. That greater role corresponded with the more expansive power of common-law courts to engage in lawmaking; judges shared with Parliament or state legislatures the responsibility to fashion laws governing the conduct of citizens within the jurisdiction. The function of the private individual, therefore, was to participate in making the law by bringing such actions, even if suffering no injury personally.[162] That practice continued, albeit to a lesser extent, even after ratification of the Constitution.[163] Private attorney general actions represent one traditional means by which citizens participate in governance.

Indeed, the Supreme Court's decisions on several occasions have reflected such reasoning. In upholding various delegations to state agencies, courts have emphasized that the "partnership" between state and federal agencies derives from the federal structure of the Constitution and the sovereignty of states.[164] The Court upheld Congress' power to delegate to Indian Tribes the power to regulate liquor, reasoning that "Indian Tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . . [T]hey are a 'separate people' possessing 'the power of regulating their internal and

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158 *See, e.g.*, 7 U.S.C. § 2906 (1988) (beef); *id.* § 2107 (cotton); *id.* § 2623 (potatoes); *id.* § 2708 (eggs); *id.* § 4506 (dairy products); *id.* § 4611 (honey); *id.* § 4806 (pork); *id.* § 4906 (watermelon); *id.* § 4306 (flowers); *id.* § 3405 (wheat).

Under the NIRA, Congress directed the President to make a finding that the trade associations formulating codes were truly representative of their members. *Schechter*, 295 U.S. at 522.

159 Congress' delegation of authority to public employee unions can be seen in a similar light. Unions, with sanction from Congress, participate in setting some of the terms and conditions of public employment, and thus help public employees—albeit to a limited extent—govern themselves. Congress has, of course, mandated that unions command majority support before receiving recognition. 5 U.S.C. § 7111(a) (1988).

160 Even Congress' reservation of power to its own members to oversee operation of Dulles and National Airports is loosely consistent with this explanation, since members of Congress are, in a sense, elected representatives of the consumer class.

161 *See, e.g.*, 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND * 60; 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 245 (1883); Note, *The History and Development of Qui Tam*, 1972 WASH U.L.Q. 81 (early English courts let "private accusers" initiate penal proceedings).

162 *See* Jaffee, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1045 (1968) ("[c]itizen participation is . . . a creative element in . . . lawmaking.").

163 *See supra* notes 95-100 and accompanying text.

164 *See supra* note 56.

social relations.' "[165] Similarly, the Court explicitly upheld the delegation of power to miners to fashion rules governing their own conduct, noting the miners' "love of order and system and of fair dealing which are the prominent characteristics of our people."[166] The Court more recently observed that the delegations to private producers under the Milk Marketing Act allow the producers a measure of self-regulation: "The Act contemplates a cooperative venture among the Secretary, handlers, and producers to raise the price of agricultural products and to establish an orderly system for marketing them. Handlers and producers . . . are entitled to participate in the adoption and retention of market orders."[167] And in private attorney general actions, the attributes of sovereignty rest not in states or Indian Tribes, but in the people themselves. As Justice Frankfurter commented, in "*qui tam* actions . . . society makes individuals the representatives of the public for the purpose of enforcing a policy explicitly formulated by legislation."[168]

Congressional delegations outside the federal government evince the continuation of part of our republican tradition, by permitting subordinate governmental units or groups of private parties to participate more directly in self-governance—to act, in essence, as a shadow executive branch. If the Executive's power can be curtailed by such delegations—as it most certainly has been—then the reason may lie in the existence of an unarticulated interest in promoting local participation in governmental activities, even if that participation is checked only by the interest of the group affected by the regulation.[169] Although the republican aspiration of participatory politics predated the Constitution,[170] strains have continued.

Delegations to private parties may be accommodated with the constitutional structure, therefore, by loose analogy to federalism principles and delegations to the states. The interest in participation—as with the interest in cooperative federalism—can at times trump the article II interest in a unitary executive.[171] As with both checks and balances ap-

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165 419 U.S. 544, 557 (citations omitted).

166 Jennison v. Kirk, 98 U.S. 453, 457 (1978).

167 Block v. Community Nutrition Inst., 467 U.S. 340, 346 (1984).

168 Priebe & Sons v. United States, 332 U.S. 407, 418 (1947) (Frankfurter, J., dissenting).

169 In effect, Congress in such situations delegates power back to the people. Although Locke disapproved of any such congressional delegations, J. LOCKE, TWO TREATISES OF GOVERNMENT 380-81 (P. Laslett 2d ed. 1967), allowing the people a more direct say in governing their lives can be seen as consistent with the purposes underlying the original delegation of power to Congress.

170 *See generally* Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1623-26 (1988); Fallon, *What is Republicanism and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1723-24 (1989); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1555-58 (1988).

171 By the same token, if the delegation outside the federal government is too expansive or touches too closely to areas at the core of executive power, the interest in a unitary executive could still prevail. Consider, for example, *Carter Coal*. The problem in that case was not merely that private individuals exercised "public" power, but that the power exercised was so sweeping as to

proaches, the participatory explanation admits that delegations of power have in fact included administrative authority and, like the external constraint strand, concedes that the article II interest in unitary law implementation has not adequately been served by all such delegations. Yet it uniquely provides an alternative concept of government, one in which local participation in self-governance can stand side by side with centralized control.

Despite its overall descriptive power, the participatory explanation cannot justify congressional delegations outside the federal government in several contexts. Most notably, it cannot account for delegations to private experts who represent no constituency. Furthermore, delegations to private individuals serving in government agencies, such as the FOMC, cannot be explained as well. Delegations to *qui tam* relators are also difficult to justify, since no one has elected the relators to help govern everyone else.

Moreover, the participatory explanation cannot be reconciled with the separation of powers doctrine as understood today. If the principle of a unitary executive is not exclusive, then Congress could displace executive control over law enforcement for a multitude of other objectives constitutionally permissible under the necessary and proper clause. Given Congress' wide interests in law enforcement, Congress could legitimately assert that its article I interest in providing for effective law enforcement can itself displace the competing article II interest in unitary law enforcement. If Congress can bypass the executive branch to further participatory values, then there is no apparent reason why it cannot delegate outside the federal government more routinely to ensure "impartial," "expert," or cost-effective law enforcement. The unitary executive would be preserved only to the extent allowed by subsequent judicial balancing.

The participatory explanation is also deeply unsettling from a public choice perspective. Only Congress has determined whether or not a group is sufficiently representative to bind individuals within that group, and it is by no means clear that the groups selected are truly representative of those affected by governmental regulation.[172] Instead, Congress

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diminish the Executive's control over and accountability for creation and implementation of the industry codes. Congressional delegation of the authority to a private individual to negotiate with a foreign power would similarly be suspect. In addition, the participatory explanation, like the checks and balances approach, does not translate into an easily applicable judicial test. Courts reviewing delegations outside the federal government would be required to make the delicate assessment of whether Congress has in fact delegated power outside the federal government in such a way that promotes participatory self-government and justifies the intrusion into the unitary executive. The standards for such a determination are elusive, to say the least.

172 Allowing affected groups to help fashion governmental regulation does not necessarily ensure the "public-regardedness" of the regulation ultimately adopted. Public choice theorists suggest that groups may not, in any event, represent the interests of their members. M. OLSON, THE LOGIC OF COLLECTIVE ACTION 126-27 (1965).

has delegated authority to concerned special interest groups. Although the participation may, to a certain extent, reflect republican values, it is an inegalitarian republicanism at best.

Congress has entrusted large milk handlers with the power to bind smaller milk handlers,[173] and consumers, of course, have no direct say in the prices they must ultimately pay for the milk. Domestic commodity producers have apparently attempted to fashion marketing orders in ways that fence out competing imports.[174] As in the liquor license example, individuals outside the groups participating in self-governance have been bound by the groups' decisions, without enjoying representation. Choosing some groups to exercise governmental power almost inevitably excludes others who are affected by the governing process, diminishing the ability of the rest of us to influence the political process.[175] Endorsing the participatory rationale would require not only a new understanding of the unitary executive, but also a new understanding of our political system.[176]

## IV. CONCLUSION

Congressional delegations outside the federal government are surprising in light of the separation of powers doctrine currently embraced by the Supreme Court. State officials, private experts, producer groups, and private citizens have all shared in implementing the legislative mandate, and Congress has shielded much of the delegated authority from

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[173] Private groups are rarely cabined by a system of checks and balances that protects minority rights. G. MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 138, 154 (1966) (discussing lack of checks on union governance); *see also Wileman Bros.*, 909 F.2d at 333-34 (nectarine and plum growers on government committee allegedly set standards to fence out competitors). *But see* Michelman, *supra* note 153 (suggesting that communitarian explanation of state delegation cases is quite possible).

[174] *See* Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971) (Florida tomato growers attempted to fix standards of quality (size) so as to disadvantage Mexican competitors); Cal-Fruit Suma Int'l v. United States Dep't of Agric., 698 F. Supp. 80 (E.D. Pa. 1988) (grape standards set by domestic producers disadvantaged Chilean grapes).

[175] G. MCCONNELL, *supra* note 173, at 348 ("One of the most serious problems of a system of decentralized political units in a liberal society is the consequent uneven sharing in power.").

[176] For these and other reasons, some state courts have been wary of legislative delegations to private professional regulatory agencies. *See* Toussaint v. State Bd. of Med. Examiners, 285 S.C. 266, 329 S.E.2d 433 (S.C. 1985) (legislation mandating that governor only appoint member of private organization to State Board of Medical Examiners held invalid); Rogers v. Medical Ass'n of Georgia, 244 Ga. 151, 259 S.E.2d 85 (1979) (invalidating appointment to state Board of Examiners of only those individuals recommended by the private Medical Association of Georgia); Gamel v. Veterans Memorial Auditorium Comm'n, 272 N.W.2d 472 (Iowa 1978) (invalidating delegation of authority to private veterans group to control construction of memorial buildings in honor of veterans); Ware v. Benedikt, 280 S.W.2d 234 (Ark. 1955) (delegation of licensing power to county medical society invalidated); Fink v. Cole, 302 N.Y. 216, 97 N.E.2d 873 (1951) (invalidating delegation of licensing authority to private jockey group); *cf.* Poe v. Menghini, 339 F. Supp. 986, 994-95 (D. Kan. 1972) (three-judge court) (Kansas law prohibits delegation of power to promulgate binding standards to private individuals such as members of JCAH).

executive supervision. If the status quo reflects a constitutional accommodation between the congressional interest in vesting implementation responsibility in a delegate of Congress' choice and the Executive's interest under article II in superintending execution of the laws, then our prior conception of a unitary executive must be revised considerably.

Delegations to states and Indian Tribes are undoubtedly the easiest to accept because of our federal structure, even if the theory of a unitary executive must be revised to a certain extent. The Executive's supervisory role can be shared with other political sovereignties in our system.

But delegations to private parties are more difficult to reconcile with our current notions of separation of powers. To be sure, many delegations are circumscribed by executive branch supervision. Many are not, however, and it is not in any event clear that the executive branch is as politically accountable for its supervision of private or state delegates as it is for directly implementing the law. Other authority delegated outside the federal government, even if unsupervised by the executive branch, may be subject to external constraints, and such constraints may ensure that private lawmaking is more public-regarding than would otherwise be the case. But relying on extra-constitutional checks is risky given that only Congress determines the efficacy of such checks, and reliance on such checks may gradually erode the safeguards built into our constitutional system.

Nor can the delegations easily be explained by our republican tradition of encouraging local participation in governance. The descriptive power of the participatory explanation leaves a considerable normative chasm, for it is by no means intuitively appealing to sacrifice executive control and public accountability for the sake of such an amorphous goal as enhancing participation in politics, particularly in light of the questionable textual and structural supports for such an approach. Participation by one group may be at another's expense, and the ultimate policy selected by private groups is not necessarily "public regarding."

In any event, none of the explanations satisfactorily accounts for congressional delegations to private experts, private individuals serving in government agencies, and private relators litigating on the government's behalf. Although sometimes constrained by executive branch supervision, such individuals have exercised, and continue to exercise, administrative authority largely unchecked by governmental or non-governmental constraints, and largely unjustified by virtue of any participatory values. Justice Scalia's concerns about substituting private groups who are "insulated from the political process,"[177] for the executive branch appear well founded, at least from the vantage point of contemporary Supreme Court doctrine.

At times, congressional delegations outside the federal government

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[177] *Mistretta*, 109 S. Ct. at 680.

may improve the quality of governmental regulation and minimize governmental expense. Yet such delegations may leave no public official politically accountable for the exercise of delegated authority, and the policy formulated outside the federal government is not likely to be checked in a constitutional sense. Although there is no guarantee that delegating similar authority to agents in the executive branch would improve the quality of the policy eventually implemented, at least there are sufficient checks on political actors to constrain excesses. Continued congressional delegations outside the federal government—whether to further privatization or to cabin the executive branch—threaten our present understanding of the separation of powers doctrine. The victim may not only be the executive branch, but individuals subject to unchecked and unreflective governance.